

7-25-2011

Hart v. Idaho State Tax Com'n Clerk's Record Dckt. 38756

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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 45964

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ORIGINAL
CLERK DISTRICT COURT

DEPUTY *Shirley Huffman*

STARR KELSO
Attorney at Law # 2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816-1312
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant

: CASE NO. CV10-9226

vs.

: APPEAL FROM THE IDAHO
BOARD OF TAX APPEALS
: PURSUANT TO I.C. 63-3812,
and RULE 84 Idaho Rules of
: Civil Procedure L3

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS
Respondents.

:

COMES NOW Appellant Philip L. Hart, a resident of the County of Kootenai, State of Idaho, by and through his attorney Starr Kelso and does hereby appeal from the Tax Commission Decision in Docket Number 21551 and Docket Number 21552, the Idaho Board of Tax Appeals Final Order Dismissing Appeal Appellant Hart's Appeal No. 10-B-1289 entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2010. Name of Agency: Idaho State Tax Commission and the Idaho Board of Tax Appeals;

1. Title of District Court: District Court For The First Judicial District Of The State Of Idaho. Jurisdiction is proper, pursuant to Idaho Code section 63-3812 (a) in this District Court because Appellant Hart is a resident of the County of Kootenai, State of Idaho.

1 APPEAL

3. The actions for which judicial review is sought:
 - a. BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO, In the Matter of the Protest of Philip L. Hart, Petitioner, DOCKET NOS. 21551 & 21552, DECISION dated September 30, 2009;
 - b. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, FINAL ORDER DISMISSING APPEAL dated August 24, 2010;
 - c. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, ORDER DENYING RECONSIDERATION dated September 24, 2010.
4. From the decision of the State Tax Commission (paragraph 3 [a] above) it appears that at least some manner of partial hearing may have been held before the State Tax Commission on July 7, 2009. It is unknown to Counsel for Appellant the extent and manner, if any, in which the possible hearing, was recorded. The State Tax Commission would presumably possess this information and record, if any. See paragraph 8 below in this regard.
5. Preliminary Statement of Issues:
 - a. The applicability of, and compliance with, Idaho Constitution, Article III, Section 7, to the issuance of any deficiency notice to him by the federal government demanding a response during the time he was serving in the 2008 Idaho Legislature?;
 - b. Whether the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1996 through 1998 (Docket Number 21551) and or the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1999 through 2004 (Docket Number 21552), based solely upon federal tax documentation, conform to the

2 APPEAL

taxation authority granted by the State of Idaho and United States

Constitutions because it, and or its result, is an unapportioned direct tax?;

- c. Whether the issuance of any deficiency notice(s), when not provided to Appellant Hart, by the federal government, are valid and or evidence of any tax owed by Appellant Hart to the State of Idaho under either or both of the cited Docket Numbers 21551 and or 21552?;
- d. Whether the federal government's unsworn to and incorrect calculation of claimed income taxes due from Appellant is valid any evidence of any tax owed by Appellant to the State of Idaho?;
- e. Whether the State of Idaho income tax statutes, as a graduated tax, fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution?;
- f. Whether the State Board of Tax Appeals upheld the sanctity of Article III, Section 7 of the Idaho Constitution in failing to confirm Appellant's Constitutional obligation to his constituency?;
- g. Whether the Idaho State Tax Commission's and the State Board of Tax Appeals affirmation thereof, acceptance of Appellant Hart's checks, and his promise to pay (which he complied with) the remainder of a required cash deposit by a taxpayer as security, without ever advising Appellant that it was not acceptable security, was a violation of its own rules, regulations, and Due Process Clauses under the Idaho and U.S. Constitutions?;
- h. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals is estopped from asserting, and/or has waived any alleged claim of, noncompliance by Appellant Hart with the "twenty percent deposit requirement" given its acceptance of Appellant Hart's cash payments, its acceptance of the cash deposit and Appellant Hart's promise to pay (without comment and without communication from its legal department that the promise was not acceptable), and its subsequent retention of the payment of the unpaid portion of the "twenty percent deposit requirement" when Appellant Hart paid it in full as promised?;

3 APPEAL

- i. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals erroneously placed any burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 which adopts and implements U.S. Code section 7491 that changed the burden of proof in tax appeals from the taxpayer to the revenue service violated Idaho state law and further violated Appellant's due process rights under the Idaho and U.S. Constitutions?;
- j. Whether the jurisdictional prerequisite requirement of a twenty percent deposit requirement of an any taxpayer, including Appellant Hart, contesting any notice of deficiency violates Appellant Hart's constitutional rights under the Due Pocess clause under the Idaho and U.S. Constitutions?;
- k. Whether the State Tax Commission/Idaho Board of Tax Appeals refusal to acknowledge and accept the cash deposit filed with the State Tax Commission for at least one of the two entirely separate Docket Numbers regarding Appellant Hart, when the cash deposit was in excess of either of the individually "required" deposits, violates the statutes of Idaho, rules of the Commission and Board of Appeals, and Appellant Hart's Due Process rights under the Idaho and U.S. Constitutions.
- l. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U. S. Constitutions by not recording and/or otherwise transcribing the hearing referenced in the State Tax Commission Decision as having occurred on July 7, 2009;
- m. Whether the State Board of Tax Appeals violated the statutes of Idaho, rules of the Board, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions by not holding a hearing on Appellant Hart's appeal.
- n. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions, after (1) receiving "additional materials" from Appellant Hart on September 10, 2009, (2) without providing Appellant Hart with a further opportunity and/or hearing to discuss the

additional materials with it, (3) without providing Appellant Hart of its notice of intent, and (4) with knowledge on the part of the State Tax Commission that it had not received all the information requested from Appellant Hart by the State Tax Commission and/or offered to be provided the State Tax Commission by Appellant Hart, by beginning preparation of its Decision in both Dockets and then subsequent issuance of its Decision in both dockets, on September 30, 2009 .

- o. Whether the State Tax Commission/State Board of Tax Appeals violated Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions, and the rules of evidence and procedure by giving consideration to unsworn representations made by the IRS and ignoring, not considering, or otherwise giving greater value and weight to the sworn to returns filed by Appellant Hart in determining tax liability, if any, of Appellant Hart.
 - p. Whether Idaho Code section 63-3812 (c) erroneously places the burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 adopt and implement U.S. Code section 7491 and it has changed the burden of proof in tax appeals from the taxpayer to the revenue service and thus violates Idaho state law and further violates Appellant's due process rights under the Idaho and U.S. Constitutions?;
- 6. A transcript of any and all proceedings recorded and or transcribed by both the State Tax Commission and the Idaho State Board of Tax Appeals is requested.
 - 7. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that a true and correct copy of the foregoing was made upon the Idaho State Tax Commission, and the Idaho State Board of Tax Appeals, on October 20, 2010, by regular First Class U.S. Mail, postage prepaid thereon and by fax as follows:

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

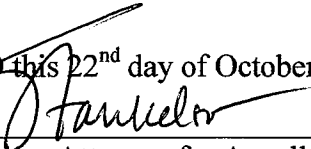
5 APPEAL

William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7846

8. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the respective representatives of the State Tax Commission and the Idaho Board of Tax Appeals that there are no transcripts or recordings in existence. Thus no estimated cost for transcripts has been paid.
9. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the representative of the State Tax Commission that its entire record was sent to the Idaho Board of Tax Appeals. The undersigned, attorney for Appellant Hart, further hereby certifies that he has been informed by the representative of the Idaho Board of Tax Appeals that there is no fee charged for the record on appeal from it.

DATED this 22nd day of October, 2010.



Starr Kelso, Attorney for Appellant Phil Hart

CERTIFICATE OF SERVICE: I certify that a copy of the foregoing was mailed and faxed to the following agencies and person on the 22nd day of October, 2010.

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
P.O. Box 36
Boise, Idaho 83722
Fax no. 208-344-7846



Starr Kelso

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, ID 83722
 TELEPHONE: (208) 334-7530
 [ISB NO. 2671]

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

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CLERK DISTRICT COURT
[Signature]
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,

Plaintiff,

-vs-

IDAHO STATE TAX COMMISSION
 and IDAHO BOARD OF TAX
 APPEALS,

Respondents.

)
) CASE No. CV 10-9226
)
) NOTICE OF APPEARANCE
)
)
)
)
)
)
)
)

TO: CLERK OF THE COURT

NOTICE IS HEREBY GIVEN that William A. von Tagen, Deputy Attorney General, hereby enters the appearance as attorney of record for the Respondent Idaho State Tax Commission in the above-entitled action. All pleadings and other documents should hereinafter be served upon counsel at the address listed above.

DATED this 15th day of November 2010.

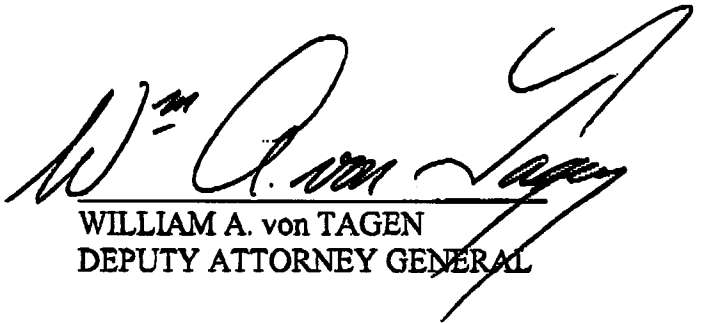
[Signature]
 WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 1st day of November 2010, served a copy of the within and foregoing NOTICE OF APPEARANCE by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, IDAHO 83722
 TELEPHONE (208) 334-7544
 [ISB #2671]

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 349

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CLERK DISTRICT COURT
 DEPUTY

Attorney for the Idaho State Tax Commission

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	AFFIDAVIT OF KRISTINE GAMBEE IN
-vs-	)	SUPPORT OF MOTION TO DISMISS
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS,)	
)	
Respondents.)	
)	

STATE OF IDAHO)
) ss
 COUNTY OF ADA)

COMES NOW, Kristine Gambée, and after first being duly sworn, deposes and says:

- 1) That the information contained herein is of your affiant's own personal knowledge;
- 2) That your affiant is bureau chief of the Idaho State Tax Commission's Field Services, and in that capacity has examined the records of the Commission in regard to the Appellant herein;
- 3) That the records of the Idaho State Tax Commission indicate that the Commission issued its decision regarding the Appellant on September 30, 2009;

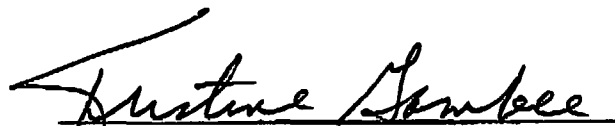
4) The Commission's records further establish that no payment was received by the Commission in this case until March 31, 2010. On that date, the Commission received two checks, one for \$7,862.04 and a second one for \$1,600.00. The total amount received by the Commission on March 31, 2010, was \$9,462.04;

5) The records of the Commission further show that a third check was received relating to this appeal on April 13, 2010, in the amount of \$1,962.36. This brings the total amount that the Appellant has paid in this matter to \$11,424.40;

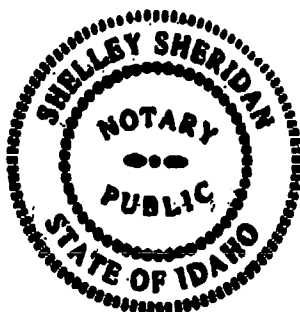
6) The records of the Tax Commission establish that no other checks or payments were received from the Appellant relating to this matter other than those detailed above.


Further your Affiant sayeth not.

DATED this 1st day of November 2010.


KRISTINE GAMBEE

SUBSCRIBED AND SWORN TO before me this 1st day of November 2010.



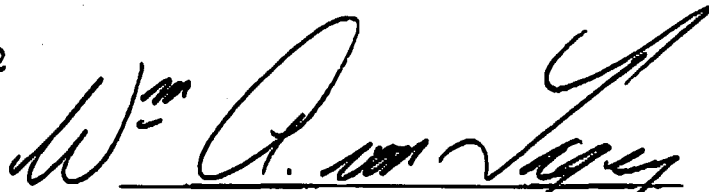

NOTARY PUBLIC FOR IDAHO
RESIDING IN Meridian, Idaho
MY COMMISSION EXPIRES: 11/8/2012

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing AFFIDAVIT OF KRISTINE GAMBEE IN SUPPORT OF MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, IDAHO 83722
 TELEPHONE (208) 334-7544
 [ISB #2671]

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 349

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CLERK DISTRICT COURT
James Sheridan
 DEPUTY

Attorney for the Idaho State Tax Commission

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	AFFIDAVIT OF SHELLEY SHERIDAN IN
-vs-	)	SUPPORT OF MOTION TO DISMISS
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS,)	
)	
Respondents.)	
)	

STATE OF IDAHO)
) ss
 COUNTY OF ADA)

COMES NOW, Shelley Sheridan, and after first being duly sworn, deposes and says:

1) That the information contained herein is of your affiant's own personal knowledge;

2) That your affiant is an administrative assistant with the Idaho State Tax Commission, and in that capacity, you affiant has access to the file in this case and has primary responsibility for the custody of that file at the Tax Commission;

3) That attached hereto as Exhibit A is a copy of a letter dated December 31, 2009, from the Appellant to Erick Shaner, Deputy Attorney General, assigned to the State Tax Commission. The letter was received by the Tax Commission on January 4, 2010;

4) That attached hereto as Exhibit B is a copy of a letter dated March 30, 2010, in which was received by the Tax Commission on March 31, 2010, from the Appellant and which was accompanied by two checks; one in the amount of \$7,862.04 and another in the amount of \$1,600.00;

5) That attached hereto as Exhibit C is a copy of a letter dated April 9, 2010, from the Appellant. This letter was accompanied by a check in the amount of \$1,962.36 which, as the letter states, brought the total amount deposited with the Tax Commission to \$11,424.40;

6) That attached hereto as Exhibit D is a copy of a letter dated April 14, 2010, from Deputy Attorney General William A. von Tagen acknowledging receipt of the checks from the Appellant and informing the Appellant of Mr. von Tagen's intent to file a Motion to Dismiss;

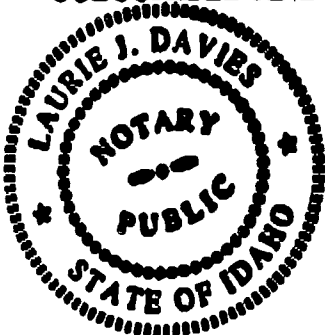
7) That attached hereto as Exhibit E is a tracking and confirmation report from the US Postal Service showing that the decision of September 30, 2009, was received by the Appellant on October 2, 2009.

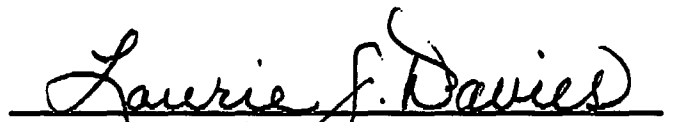
Further your Affiant sayeth not.

DATED this 1st day of November 2010.


SHELLEY SHERIDAN

SUBSCRIBED AND SWORN TO before me this 1st day of November 2010.



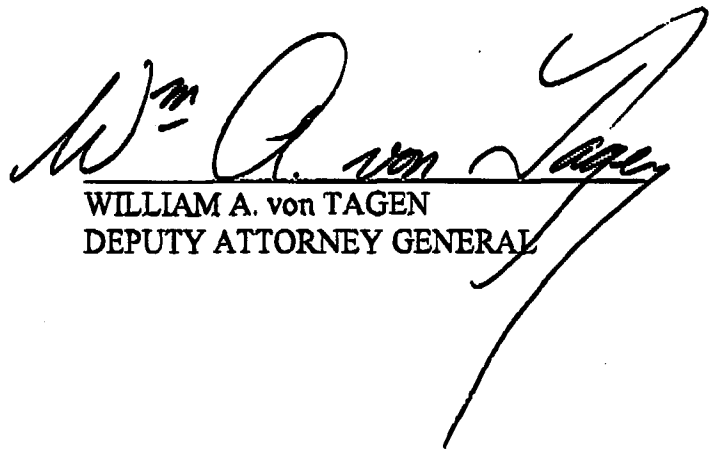

NOTARY PUBLIC FOR IDAHO
RESIDING IN Boise Idaho
MY COMMISSION EXPIRES: 9-10-2015

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing AFFIDAVIT OF SHELLEY SHERIDAN IN SUPPORT OF MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

STATE OF IDAHO } SS
COUNTY OF KOOTENAI } 344
FILED: } So

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CLERK DISTRICT COURT
[Signature]
DEPUTY

Attorney for the Idaho State Tax Commission

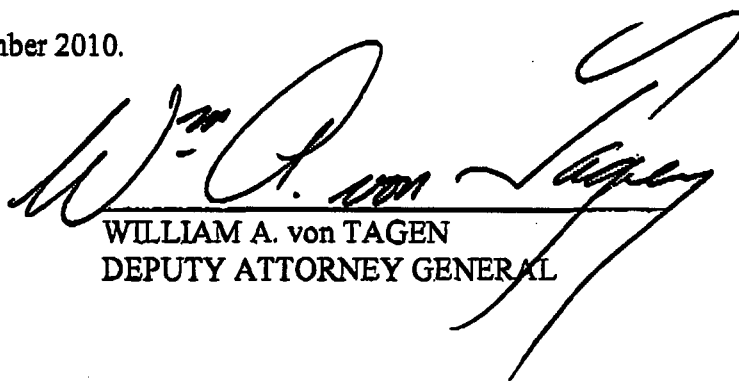
**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	MOTION TO DISMISS
-vs-)	
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS,)	
)	
Respondents.)	
)	

COMES NOW, the respondent, Idaho State Tax Commission pursuant to Idaho Rule of Civil Procedure 12(b)(1), by and through its attorney, Deputy Attorney General William A. von Tagen, and respectfully moves this board for an Order dismissing the appeal of the Appellant, Philip L. Hart. This motion is based upon this board's lack of jurisdiction resulting from the failure of the Appellant to strictly comply with the provisions of Idaho Code § 63-3049 in that Appellant did not perfect his appeal in a timely fashion in as much as a notice of appeal was not filed within the 91-day period set forth in Idaho Code § 63-3049.

For the reasons set forth above, the Respondent respectfully asks this board to dismiss Appellant's appeal with prejudice.

DATED this 15th day of November 2010.



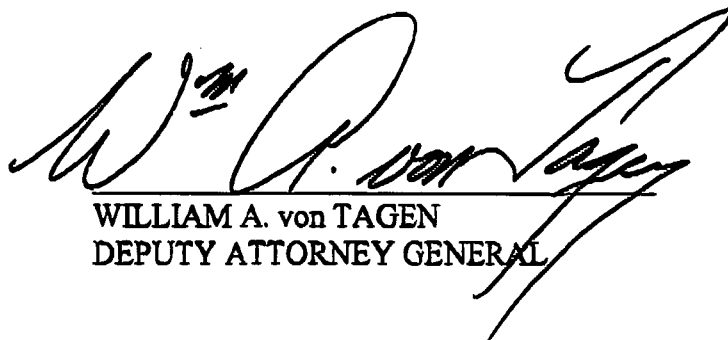
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, IDAHO 83722
 TELEPHONE (208) 334-7544
 [ISB #2671]

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED: 349

2010 NOV -1 PM 3:33

CLERK DISTRICT COURT
 DEPUTY

Attorney for the Idaho State Tax Commission

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,

Appellant,

-vs-

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS

Respondents.

) CASE NO. CV 10-9226
)
) MEMORANDUM IN SUPPORT OF
) MOTION TO DISMISS
)
)
)
)
)
)
)

I.

STATEMENT OF THE CASE

This matter is the appeal of a dismissal by the Board of Tax Appeals case for the failure of Mr. Hart to perfect his appeal of a Tax Commission Decision in a timely fashion. The Idaho Tax Commission Decision appealed by Mr. Hart affirmed an income tax deficiency assessed against the Appellant for the years 1996 - 2004. The Appellant, by his own admission, received a copy of the Tax Commission's decision on October 2, 2009. A timely appeal of the decision would have had to have been filed with the State Board of Tax Appeals or with the District Court not later than January 4, 2010. The Board of Tax Appeals' record shows that no such appeal was

received by that date. It is the Appellant's assertion that his status as a legislator relieves him of having to take the affirmative step of appealing the Tax Commission decision in a timely fashion. The Commission does not agree with the Appellant that the Idaho Constitution relieves the Appellant from filing an appeal in a timely fashion.

II.

ISSUES PRESENTED

- A. Whether the Dismissal by the Board of Tax Appeals should be upheld?
- B. Whether the court has jurisdiction to review this case in the absence of the taxpayer timely perfecting an appeal of the Tax Commission's decision?
- C. Whether taxpayer's status as a legislator relieves taxpayer of his obligation to perfect an appeal under Idaho Code § 63-3049?

III.

FACTS

As noted above, the Tax Commission issued a decision in this case on September 30, 2009. Taxpayer admits that he received a copy of this decision on October 2, 2009. On December 31, 2009, the taxpayer wrote a letter to Deputy Attorney General Erick Shaner stating that it was his intention to file an appeal following the close of the legislative session. In that letter, which is attached as an exhibit to the affidavit of Shelley Sheridan, taxpayer acknowledges that his appeal time would run on January 2, 2010, but asserted his belief that his status as a member of the Idaho Legislature relieves him of having to comply with the statute of limitations contained in Idaho Code § 63-3049.

The Appellant did nothing during the legislative session with respect to this appeal. The legislature adjourned on Monday, March 29, 2010. Two days later, on March 31, 2010,

Appellant filed a Notice of Appeal with the State Board of Tax Appeals and sent a copy to the Idaho State Tax Commission. Along with the copy sent to the Tax Commission, Appellant sent the Commission two checks totaling \$9,462.04. The Appellant said he would send the remaining amount by April 9, 2010. On April 13, 2010, the Tax Commission received a check from the Appellant in the amount of \$1,962.36. To date, the Appellant has paid a total of \$11,424.40 to the Tax Commission on his outstanding deficiency.

On April 15, 2010, the Respondent filed with the Board of Tax Appeals a Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Affidavits of Kristine Gambie and Shelley Sheridan. The Appellant filed a Motion for Extension of Time to Respond to Respondent's Motion to Dismiss on May 21, 2010, and subsequently a Memorandum in Opposition to Motion to Dismiss on May 24, 2010. The Tax Commission filed a reply to the Appellant's Memorandum in Opposition to Motion to Dismiss on May 26, 2010. The State Board of Tax Appeals issued a final Order dismissing the Appellant's appeal on August 24, 2010.

Appellant filed a Motion for Reconsideration to the State Board of Tax Appeals on September 3, 2010, and on September 24, 2010, the State Board of Tax Appeals issued an Order Denying the Appellant's Motion for Reconsideration.

IV. DISCUSSION

THE COURT LACKS JURISDICTION OVER A TAXPAYER'S APPEAL UNLESS THE TAXPAYER STRICTLY COMPLIES WITH IDAHO CODE § 63-3049 WHICH GOVERNS APPEALS FROM THE TAX COMMISSION TO THE BOARD OF TAX APPEALS OR TO THE DISTRICT COURT.

Idaho Code § 63-3811 governs appeals to the Board of Tax Appeals from a final determination of any tax liability. The Code section provides:

Taxpayers may, within the period herein provided and by following the procedures herein required, appeal to the Board of Tax Appeals for a final determination of any tax liability, including those pursuant to Idaho Code §§ 63-501, 63-511, and 63-3049.

Thus, while the appeal was pursuant to Idaho Code § 63-3811, it must comply with the provisions of Idaho Code § 63-3049. Idaho Code § 63-3049 provides that an appeal must be filed within 91 days of the receipt of notice of the decision of the Idaho State Tax Commission denying in whole or in part, any protest of the taxpayer. The taxpayer, by his own admission, acknowledges that 91 days expired on Saturday, January 2, 2010, thus the appeal should have been received by the Board of Tax Appeals by Monday, January 4, 2010. Unless the taxpayer complied with Idaho Code § 63-3049, this court lacks jurisdiction.

The Idaho Supreme Court took up the issue of the jurisdiction to review appeals from the Tax Commission in Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 p.2d 313 (1999). That case involved an appeal of a Tax Commission decision by Ag Air. Regarding the jurisdictional requirement and the requirements of Idaho Code § 63-3049, the Court held that the District Court did not acquire jurisdiction over the case until payment had been made to the Tax Commission.

In this case, no payment was received within the 91-day time period. No payment whatsoever was received until it was mailed by the taxpayer on March 31, 2010. The entire 20 percent was not received until April 13, 2010. The taxpayer did not appeal in a timely fashion and did not pay 20 percent of the tax due in a timely fashion. Consequently, this court lacks jurisdiction.

**TAXPAYER'S STATUS AS A LEGISLATOR DOES NOT RELIEVE HIM
FROM THE OBLIGATION TO PERFECT HIS APPEAL AND THIS
COURT DOES NOT ACQUIRE JURISDICTION OVER TAXPAYER'S
APPEAL EXCEPT WHEN IT IS PERFECTED IN A TIMELY FASHION.**

In his letter of December 31, 2009, the taxpayer sets forth his belief that his status as a legislator allows him to defer the filing of his appeal until after the close of the legislative session. Taxpayer cites as authority the Idaho Const. art. III, § 7 which provides:

Privileged from arrest. - Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature nor during the 10 days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place.

Apparently, it is the taxpayer's belief that the phrase "shall not be liable to any civil process" relieves him from the provisions of Idaho Code § 63-3049 which requires him to file his appeal within 91 days of the date he received his decision. Taxpayer recognizes that the appeal time would have run and that his appeal was due in the office of the Idaho Board of Tax Appeals not later than January 4, 2010. However, it is the taxpayer's contention that because the legislature went into session on January 11, 2010, that he was relieved from having to file his appeal by operation of Art. III, sec. 7.

Not being liable to any civil process does not mean that taxpayer is relieved from the operation of statutes of limitations such as those found in Idaho Code § 63-3049. In answering the taxpayer's contention, it is important first to determine a definition of "civil process." According to Webster's Dictionary, "civil process" is defined:

civil process *n* : a writ or order of court in a civil action; *esp* : a writ for arrest in a civil proceeding

Merriam-Webster Incorporated, Webster's 3rd New International Dictionary, principal copyright 1961, copyright 2002.

No civil process has been issued by this court, by the Board of Tax Appeals or the Tax Commission which conflicts with Art. III, sec. 7 of the Idaho Constitution. No summons has been issued, no subpoena served. The Tax Commission is not seeking contempt proceedings nor

a warrant for civil arrest. Art. III, sec. 7 prohibits these things, but it does not stay the statute of limitations and excuse the Appellant from his obligation to file a timely appeal. It is important to remember that this is a case where the Appellant has the responsibility of initiating the proceedings.

Arizona has a provision in its constitution similar to Art. III, sec. 7. The Arizona provision can be found at Art. IV, part 2, sec. 6 of the Arizona Constitution and provides:

Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and they shall not be subject to any civil process during the session of the legislature, nor for 15 days next before the commencement of each session.

This provision is substantively the same as Idaho's except that Arizona extends the privilege for 15 days prior to the session whereas Idaho's extends to only 10 days prior to the session. The Arizona Supreme Court had occasion to interpret this provision in Smith v. Arizona Citizens Clean Elections Commission, 212 Arizona 407, 132 p.3d 1187 (2006). The Arizona court noted that the purpose of the provision was to prevent either a criminal or civil arrest of a legislator that would prevent a legislator from attending the session. After noting the rationale, the court went on to hold:

That rationale does not pertain here. Smith is not defending a suit brought by another. Instead, Smith has invoked the jurisdictions of the courts. On January 24, 2006, for example, Smith filed a petition for review urging this court to accept jurisdiction and reverse the court of appeals memorandum decision, which has affirmed the superior courts judgment that Smith should forfeit his seat in the legislature.

132 p.2d at 1190.

In this case, the taxpayer is seeking to invoke the jurisdiction of this court and is not defending himself from civil process. It is the taxpayer who is filing this action. In addition, civil process means a writ or order of a court in a civil action and, in particular, a writ for arrest in a civil proceeding. If the Tax Commission were seeking to enforce an administrative

summons against Representative Hart or attempting to subpoena him in a judicial or administrative proceeding, then Art. III, sec. 7 of the Constitution would be pertinent. However, this is not what is happening. Representative Hart is arguing that Art. III, sec. 7 tolls the statute of limitations. I am aware of no case in which a court has held that a constitutional provision similar to Art. III, sec. 7 tolls the statute of limitations in a civil action or for an appeal from an administrative or judicial action.

It is also worth noting that in the Arizona case, the court noted that appeal times are jurisdictional. The court held on a related matter:

It is well settled that the time for filing an appeal, whether by appeal or by complaint for judicial review following the conclusion of the administrative process is jurisdictional. (Citations omitted.) The Commission has no power to waive it because the failure to timely appeal "deprive[s] th[e] court of jurisdiction to review the [administrative] decision.

132 p.3d at 1193.

V.

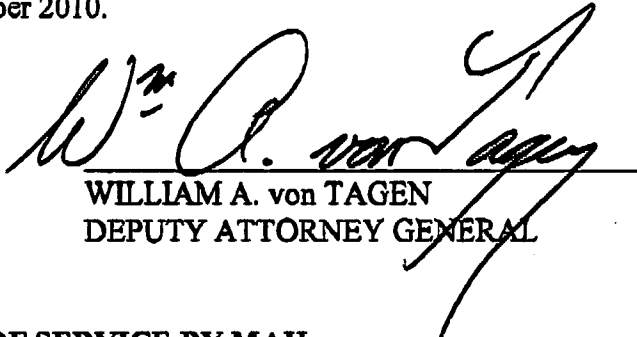
CONCLUSION

Idaho Code section 63-3049 is clear on its face that a taxpayer has 91 days after receipt of the notice of decision to file an appeal either with this board or with the district court. By his own admission, the taxpayer did not do so in this case. The code section is also clear that before a taxpayer may seek review by the district court or by the Board of Tax Appeals, the taxpayer shall secure payment of the tax by depositing cash with the Tax Commission in an amount equal to 20 percent of the amount asserted. By his own admission, the taxpayer did not do this within the prescribed time limits. The taxpayer apparently believes that this security requirement can be met simply by making another promise to provide security at some date later

than that required by statute. This "stacking of promises" does not meet the requirements of the statute nor does it meet the definition for security.

The taxpayer, Phil Hart, is seeking to use his status as a legislator to relieve himself of having to comply with the statute of limitations set forth in Idaho Code § 63-3049. Representative Hart has misread Art. III, sec. 7, and in so misreading, has failed to comply with the mandatory provisions of Idaho Code § 63-3049. Consequently, this court is without jurisdiction to hear Representative Hart's appeal. The court has no alternative but to dismiss the appeal of the taxpayer, Phil Hart.

DATED this 15th day of November 2010.

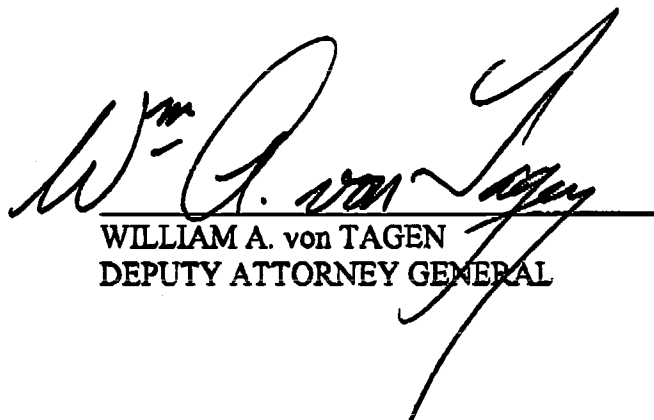

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, ID 83722
 TELEPHONE: (208) 334-7530
 [ISB NO. 2671]

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED: 349

2010 NOV -1 PM 3:34

CLERK DISTRICT COURT
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,

Plaintiff,

-vs-

IDAHO STATE TAX COMMISSION
 and IDAHO BOARD OF TAX
 APPEALS,

Respondents.

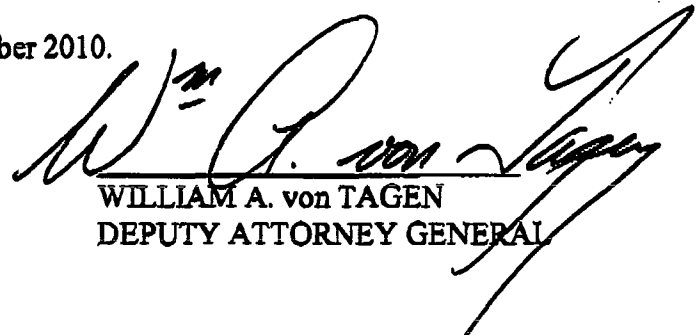
CASE No. CV 10-9226

TAX COMMISSION'S NOTICE OF
 HEARING

TO: PHILIP L. HART and his attorney of record, Starr Kelso, Attorney at Law.

YOU ARE HEREBY NOTIFIED that a hearing has been set on the Idaho State Tax Commission's Motion to Dismiss for December 7, 2010, at the hour of 3:30 p.m., PST, of said date, or as soon thereafter as counsel can be heard, before Judge Lansing L. Haynes, Kootenai County Courthouse, at 501 Government Way, Coeur d'Alene, ID 83816-9000, Idaho.

DATED this 15th day of November 2010.

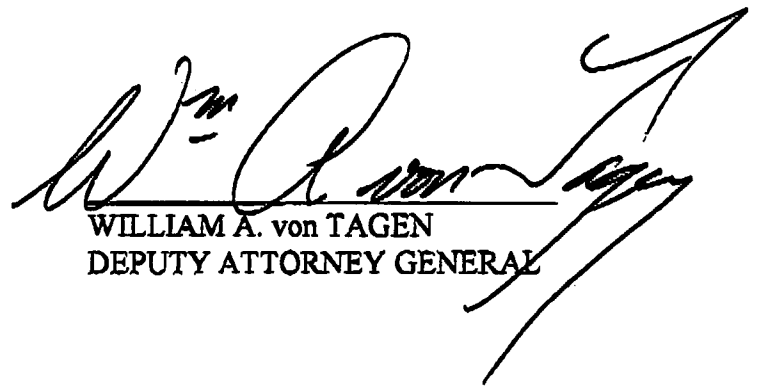

 WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing TAX COMMISSION'S NOTICE OF HEARING by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 338

2010 NOV -4 PM 2:00

CLERK DISTRICT COURT
 DEPUTY *[Signature]* JLC

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Plaintiff
 Phil Hart

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHIL HART,

Plaintiff(s).

v.

IDAHO STATE TAX COMMISSION, and
 IDAHO BOARD OF TAX APPEALS

Defendant(s).

Case No: CV 10-~~9229~~ 9226

**MOTION TO DISQUALIFY JUDGE
 LANSING L. HAYNES PURSUANT TO
 IRCP Rule 40(d)(1)(A) and (B)**

COMES NOW the Plaintiff, Phil Hart, by and through his attorney of record,
 Starr Kelso and pursuant to IRCP Rule 40(d)(1)(A) and (B) moves to disqualify Judge
 Haynes from this matter.

DATED this 4th day of November 2010.

[Signature]
 Starr Kelso, Attorney for Plaintiff
 Phil Hart

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2010 a true and correct copy of the foregoing was served by delivering the same to each of the following by the method below, addressed as follows:

WILLIAM VON TAGEN
Deputy Attorney General
P.O. Box 36
Boise ID 83733

☒ Mailed;
☒ Facsimile (208)334-7844
☐ Hand-Delivered;

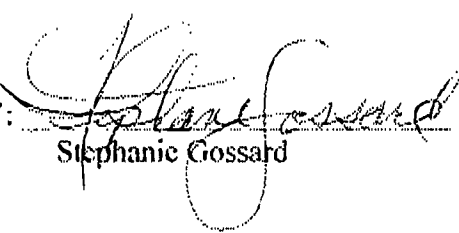
STATE OF IDAHO BOARD OF STATE
TAX APPEALS
P.O. Box 83720
Boise, ID 83770-0088

☒ Mailed
☒ Facsimile (208) 334-4060
☐ Hand-Delivered;

JUDGE LANSING L. HAYNES
P.O. Box 9000
Coeur d' Alene ID 83816-9000

☒ Mailed
☐ Facsimile
☐ Hand-Delivered:

BY:


Stephanie Gossard

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
FILED:

2010 NOV 10 PM 4:15

CLERK DISTRICT COURT
[Signature]
DEPUTY

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Plaintiff
Phil Hart

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHIL HART,

Plaintiff(s).

v.

IDAHO STATE TAX COMMISSION, and
IDAHO BOARD OF TAX APPEALS

Defendant(s).

Case No: CV 10-9226

ORDER ON MOTION TO DISQUALIFY

DENIED. A Rule 40(d)(1)(A) disqualification is not available to a party when the assigned judge is acting in an appellate or judicial review of state agency action. IRCP 40(d)(1)(I)(i); Arthur v. Shoshone County, 133 Idaho 854, 993 P.2d 617 (Ct. App. 2000).

Plaintiff's motion having been received and reviewed and pursuant to IRCP Rule 40(d)(1)(A) no cause to disqualify being required, it is ^{NOT} HEREBY ORDERED that Judge Haynes hereby disqualifies himself, ~~and the matter is directed to the First Judicial District Administrative Judge.~~

DENIED
DATED this 10 day of November 2010.

Lansing L. Haynes
JUDGE LANSING L. HAYNES, District Court Judge

CLERKS CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of November, 2010 a true and correct copy of the foregoing was served by delivering the same to each of the following by the method below, addressed as follows:

WILLIAM VON TAGEN
Deputy Attorney General
P.O. Box 36
Boise ID 83733

Stan Kelso
Fax 208-664-6261

☐ Mailed;
☒ Facsimile (208)334-7844
☐ Hand-Delivered;

STATE OF IDAHO BOARD OF STATE
TAX APPEALS
P.O. Box 83720
Boise, ID 83770-0088

☐ Mailed
☒ Facsimile (208) 334-4060
☐ Hand-Delivered;

BY:

Luigi Sverdelis

ORDER

Page 2

6364

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: NOV. 10, 2010
AT 5:00 O'CLOCK P M
CLERK, DISTRICT COURT
Jan. Swenson
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHIL HART,)	
	)	CASE NO. CV2010-9226
Appellant,)	
	)	ORDER RESCINDING ORDER
vs.	)	DENYING MOTION TO
	)	DISQUALIFY; ORDER OF
IDAHO STATE TAX COMMISSION, and	)	DISQUALIFICATION
IDAHO BOARD OF TAX APPEALS,)	
)	
Respondents.)	
_____)	

THIS COURT HEREBY RESCINDS its previous Order Denying Motion to Disqualify, and now Orders District Judge Lansing L. Haynes disqualified from the above entitled matter pursuant to I.R.C.P. 40(d)(1)(A). This Order Rescinding is based on a further review of I.C. § 63-3812, the statutory basis on which Appellant has appealed from the decision of the Idaho Board of Tax Appeals. I.C. § 63-3812(c) provides that an appeal based on any issue presented by the appellant to the board of tax appeals shall be heard and determined by the court without a jury in a trial de novo. The district court is then required to issue a written decision including a statement of the facts found by the court and conclusions of law reached by the court.

I.R.C.P 40(d)(1)(I)(i) allows a party to disqualify a judge hearing an appeal by trial de novo.

IT IS HEREBY ORDERED that District Judge Lansing L. Haynes is disqualified from the above entitled matter, and the matter is directed to the Administrative District Judge for the

First Judicial District for further assignment. This Court's Order Denying Motion to Disqualify is RESCINDED.

ENTERED this 10 day of November, 2010.

Lansing L. Haynes
LANSING L. HAYNES
DISTRICT JUDGE

CERTIFICATE OF MAILING/DELIVERY

On this 10 day of Nov., 2010, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following:

Starr Kelso
Attorney at Law
Fax: 208-664-6261

William von Tagen
Deputy Attorney General
Fax: 208-334-7844

State of Idaho Board of State Tax Appeals
Fax 208-334-4060

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

By Seri Herdster

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

FILED 11/15/2010 AT 10:26 AM
STATE OF IDAHO, COUNTY OF KOOTENAI SS
CLERK OF THE DISTRICT COURT
BY Michael Clausen DEPUTY

PHILIP L HART

VS.

IDAHO STATE TAX COMMISSION, ETAL.

Case No: CV-2010-9226

ORDER ASSIGNING DISTRICT JUDGE
ON DISQUALIFICATION WITHOUT CAUSE

The Honorable Lansing L. Haynes, District Judge, being disqualified pursuant to I.R.C.P Rule 40(d)(1)(A) from proceeding further in the above entitled action:

IT IS HEREBY ORDERED that the Honorable John T. Mitchell, District Judge of the First Judicial District of the State of Idaho, is hereby assigned to take jurisdiction of the above entitled action for all further proceedings herein. The following alternate judges are hereby assigned to preside in this case: Benjamin R. Simpson, John P. Luster; Charles W. Hosack, Fred M. Gibler, and George R. Reinhardt, III.

IT IS FURTHER ORDERED that the Clerk of the District Court of Kootenai County shall cause a copy of this Order Assigning District Judge on Disqualification to be mailed or faxed to counsel for each of the parties, or if either of the parties are represented pro se, directly to the pro se litigant.

DATED this 15 day of November, 2010.

John T. Mitchell
John T. Mitchell, Administrative District Judge

I certify that copies of this Order were served as follows:

☒ Honorable John T. Mitchell, Interoffice Delivery (include file)

Plaintiff's Counsel: Starr Kelso
P.O. Box 1312
Coeur d'Alene ID 83816-1312
Mailed _____ Hand Delivered _____ ☒ Faxed (208) 664-6261

Defendant's Counsel: William A von Tagen
PO Box 83720
Boise ID 837200010
Mailed _____ Hand Delivered _____ ☒ Faxed (208) 334-7844

Dated: November 15, 2010
Daniel J. English
Clerk Of The District Court

By: Michael Clausen
Deputy Clerk

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, ID 83722
TELEPHONE: (208) 334-7530
[ISB NO. 2671]

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 NOV 17 AM 11:09

CLERK DISTRICT COURT

ORIGINAL
DEPUTY *Blaumle*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,

Plaintiff,

-vs-

IDAHO STATE TAX COMMISSION
and IDAHO BOARD OF TAX
APPEALS,

Respondents.

)
) CASE No. CV 10-9226
)
) AMENDED TAX COMMISSION'S
) NOTICE OF HEARING
)
)
)
)
)
)
)

TO: PHILIP L. HART and his attorney of record, Starr Kelso, Attorney at Law.

YOU ARE HEREBY NOTIFIED that a hearing has been set on the Idaho State Tax Commission's Motion to Dismiss for December 7, 2010, at the hour of 3:30 p.m., PST, of said date, or as soon thereafter as counsel can be heard, before Judge John T. Mitchell, Kootenai County Courthouse, at 501 Government Way, Coeur d'Alene, ID 83816-9000, Idaho.

DATED this 15th day of November 2010.

W. A. von Tagen
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

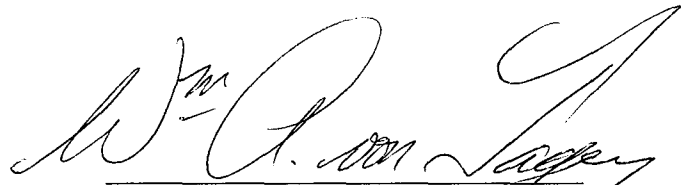
AMENDED TAX COMMISSION'S
NOTICE OF HEARING - 1

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of November 2010, served a copy of the within and foregoing AMENDED TAX COMMISSION'S NOTICE OF HEARING by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: *SR*

2010 NOV 18 PM 3:45

CLERK DISTRICT COURT

Molly Rosenbusch
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART, : CASE NO. CV 10-9226
 Appellant.

vs. : NOTICE OF HEARING

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS, :
 Respondents.

TO: RESPONDENTS IDAHO STATE TAX COMMISSION AND IDAHO BOARD OF
 TAX APPEALS, and your attorney, William A. von Tagen, Deputy Attorney General.

YOU ARE HEREBY NOTIFIED that a hearing has been set on Mr. Hart's Motion to
 Strike the Affidavits of Kristine Gambree and Shelley Sheridan for December 7, 2010, at the hour
 of 3:30 p.m., PST, or as soon thereafter as counsel may be heard, before Judge John T. Mitchell,
 Kootenai County Courthouse, 501 Government Way, Coeur d'Alene, Idaho.

DATED this 18 day of November, 2010.

Starr Kelso
 Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tagen, Deputy Attorney
 General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on November 18, 2010.

Starr Kelso
 Starr Kelso

1 NOTICE OF HEARING ON MOTION TO STRIKE AFFIDAVITS

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: *SK*

2010 NOV 18 PM 3:45

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

CLERK DISTRICT COURT
Mally Senturia
DEPUTY

Attorney for Mr. Hart

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,	:	CASE NO. CV 10-9226
Appellant,		
vs.	:	APPELLANT HART'S
		MOTION TO STRIKE AFFIDAVITS
		OF KRISTINE GAMBEE AND
IDAHO STATE TAX COMMISSION and	:	SHELLEY SHERIDAN
IDAHO BOARD OF TAX APPEALS,	:	PURSUANT TO IRCP RULE 12 (f)
Respondents.		

COMES NOW the Appellant, Phil Hart, by and through his attorney and Pursuant to IRCP Rule 12 (f) moves this Court for its Order striking the affidavits of Kristine Gambec and Shelley Sheridan filed in support of Respondents' Motion to Dismiss.

The basis of this motion is that these affidavits, nor any affidavits, are not properly considered in an IRCP Rule 12(b) (1) Motion to Dismiss for lack of jurisdiction.

Appellant Hart further objects to converting this motion to a motion for summary judgment without due and proper notice and the ability to obtain deposition testimony from Respondents and affiants and affidavits from Mr. Hart who is currently out of the area and not capable of being contacted by counsel.

Oral Argument is requested.

DATED this 18 day of November, 2010.

Starr Kelso
Starr Kelso, Attorney for Mr. Hart

1 MOTION TO STRIKE AFFIDAVITS

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tegen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on November 18, 2010.


Starr Kelsö

2 MOTION TO STRIKE AFFIDAVITS

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: SR #297

2010 NOV 18 PM 4:10

CLERK DISTRICT COURT

DEPUTY *Mallye L. Lusk*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,

: CASE NO. CV 10-9226

vs.

APPELLANT HART'S
 : REPLY TO DEFENDANTS'
 12 (b) (1) MOTION TO DISMISS

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS, :
 Respondents.

COMES NOW the Appellant, Phil Hart, by and through his attorney and hereby responds to Respondents' Motion to Dismiss. The Motion is based upon IRCP Rule 12 (b) (1), "lack of jurisdiction over the subject matter."

Idaho Code section 63-3812 specifically provides for this Court's jurisdiction to review, by trial de novo, the appeal of Appellant Hart in this matter.

The essence of a trial de novo is the receipt of evidence, in a new proceeding, to determine the issues. The Court, as correctly determined by Judge Haynes in his written opinion ordering his disqualification, is not acting as an appellate court. This Court is acting as a trial court in a trial de novo where its decision will be rendered based upon the evidence presented to it, at trial.

The District Court, by statute, has jurisdiction to determine the issue of whether Idaho Constitution Article III section 7 applies to Mr. Hart's appeal of the Tax Commission's attempt to assess disputed taxes against Mr. Hart, and the Board of Tax Appeals rulings, and all the other rulings issued by Respondents. Respondents' rulings were erroneous.

Respondents' argument that this Court has no jurisdiction to hear Mr. Hart's *appeal*, is in effect asserting no court, anywhere at any level, has jurisdiction to determine whether or not they

1 REPLY TO MOTION TO DISMISS

were correct in their rulings. How is the application of Article III section 7 ever judicially determined if, as Respondents assertion that this Court has no jurisdiction is given any credence? If that is what the statutory appeal rights contemplate, no judicial review because Respondents say so, what "right" does a "right" of appeal confer on any person appealing such a ruling? This Court has jurisdiction to determine all the issues raised in this appeal, by trial de novo, including but not limited to whether Mr. Hart was required to strictly comply to I.C. section 63-3811 and section 63-3049, despite the Constitutionally mandated conduct, followed by Mr. Hart, under Article III section 7. In exercising its "jurisdiction" the Court may ultimately hold, based upon the evidence introduced at trial and its application of the law thereto, that Mr. Hart was required to but did not comply strictly with the statutory appeal requirements even considering Article III section 7. However, for the Court to hold it has no "jurisdiction" to determine all issues, including that one, would be to essentially eviscerate Article III section 7. Any such determination as to the applicability of Article III section 7 is a determination to be made by this Court *after* it exercises its "jurisdiction" and conducts a trial de novo.

The Respondents' miscite *Ag Air, Inc. v. Idaho State Tax Commission*, 132 Idaho 345, 972 P. 2d 313 (1999). In *Ag Air* the Supreme Court *did not hold that the District Court has no jurisdiction to hear an appeal* pursuant to statute. The Supreme Court's decision had nothing to do with the "jurisdiction" of the District Court to hear an *appeal*, in a de novo trial. It held:

"...actions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative procedures must be exhausted." (emphasis added)

"...the court has no power to avoid a jurisdictional defect caused by a failure to appeal a decision by extending the time for the filing." (emphasis added)

What the Supreme Court held, in *Ag Air*, was that a *declaratory judgment proceeding* could not be used to *avoid a person's failure to follow appeal procedures*. By filing this appeal, Mr. Hart is following the statutory appeal procedure as specifically required by the Court in *Ag Air*. His appeal is precisely what appeal procedures require and provide. If Mr. Hart instead of pursuing this appeal, and he hasn't, filed a collateral action seeking a "declaratory judgment" the Respondents would be correct. However, Mr. Hart has *not* filed a *declaratory action*. He has *filed this appeal*.

2 REPLY TO MOTION TO DISMISS

This appeal is *not* a collateral action for a declaratory judgment. It is *an appeal* specifically provided for by statute. There is no assertion by Respondents that Mr. Hart did not timely file *this appeal* with this Court. Mr. Hart is following the appeal process provided by statute. He may ultimately be held, after trial de novo, to have not complied with the appeal process provided by statute because Article III section 7 does not apply to the *facts* of this case. However, Hart is not bringing a separate independent action. This Court has jurisdiction over his appeal. The motion to dismiss, pursuant to IRCP Rule 12 (b) (1), by Respondents mischaracterizes facts of *Ag Air* and the Supreme Court's decision. Their Motion is without merit as a Rule 12 (b) (1) Motion to Dismiss.

By filing the affidavits of Shelley Sheridan and Kristine Gambee by Respondents, in support of their Motion to Dismiss for lack of jurisdiction, the Respondents have chosen to not only miscite *Ag Air* but also to ignore the Idaho Rules of Civil Procedure by improperly attempting to frame the issue they raise as a pure issue of law, rather than one to be determined by this Court upon receipt of evidence presented at trial de novo and the application of the law thereto, even though they have filed affidavits reciting "facts" to support their position. Such resolution of one or more issues in this matter might possibly be properly presented to the Court, at a later date and time, as a Motion for Summary Judgment under IRCP Rule 56, or as a Motion for a Directed Verdict under IRCP Rule 50 (a). The fact remains, however, that this matter as presented by Respondents is not properly before this Court on a 12 (b) (1) Motion to Dismiss.

Plaintiff as reflected by his Motion to Strike these two affidavits strenuously objects to the Court proceeding, at this time, to determine the Defendants' Motion to Dismiss by in effect converting it into a Motion for Summary Judgment.

Respondents' motion to the extent it argues Mr. Hart did not timely pay a 20 percent appeal requirement is not even, improperly, supported by affidavit, even though such a claim would require an affidavit because in a trial de novo there is no evidence before the Court to rule.

Mr. Hart contends in this Appeal that the requirement to file a 20 percent bond is not constitutional. He also contends, that if it is constitutional to make such an arbitrary requirement, then he complied with the requirement in both separate matters and in each matter individually. This is another mixed question of fact and law. If the Court were to review and consider the Board of Tax Appeals record it would see that Mr. Hart vigorously argues the facts and the law

3 REPLY TO MOTION TO DISMISS

that such a bond is not constitutional and if it is the such a bond requirement was met on each, and both of the respective assessments. A Motion to Dismiss is not a proper procedure to bring such an issue to this Court for review in a trial de novo.

Respondents' argument to the extent it argues that *Smith v. Arizona Citizens Clean Elections Commission*, 212 Arizona 407, 132 P. 3d 1187 (2006) is persuasive authority is also a misapplication of the law and the facts to this case. *Smith* involved a civil suit which he brought (initiated) by himself. Here, Mr. Hart, is *appealing the prior rulings* of Respondents to this Court to be determined in a trial de novo. Mr. Hart is not before this Court because he is "seeking to invoke the jurisdiction of this court" by initiating an original action. Mr. Hart is appealing the Respondents' prior rulings pursuant to the statutory appeal procedure. This matter was initiated and brought by the Tax Commission. Its ruling was followed by the Board of Tax Appeals erroneous rulings. This appeal is not a result of Mr. Hart's affirmative initiation of these tax issues. This appeal is a result of Mr. Hart's responsive appeal taken to challenge Respondents rulings below.

This Court in it's trial de novo will utilize the Idaho Rules of Civil Procedure. Indeed the Respondents have utilized the Idaho Rules of Civil Procedure to bring this motion, albeit improperly. Respondents can not simultaneously, as part of their motion under the Idaho Rules of Civil Procedure, argue that this entire process does not qualify under the liberal construction standard applicable to constitutional mandates such as Article III section 7 of the Idaho Constitution, as being the result of "any civil process" or proceeding.

CONCLUSION

The Court should deny the Respondents' Motion to Dismiss for lack of "jurisdiction."

DATED this 8 day of November, 2010.


 Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on November 18, 2010.


 Starr Kelso

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1 SS

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CLERK DISTRICT COURT
Mallye Lentz
DEPUTY

PHILIP L. HART,

Petitioner.

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.

) Case No. CV 10-9226

)
) NOTICE OF FILING OF
) AGENCY RECORD

Attached is the file from the Idaho State Board of Tax Appeals for Appeal
No. 10-B-1289, appealed to the First Judicial District Court of Kootenai County.

CERTIFICATE OF MAILING

I hereby certify that I have on this 17th day of November, 2010, mailed
a copy of the within and foregoing document by sending the same by United States mail,
postage prepaid, in an envelope addressed to Clerk of the First Judicial District Court, P.O.
Box 9000, Coeur d'Alene, ID 83816-9000, and mailed a copy of the Notice of Filing of
Agency Record to Starr Kelso Esq., P.O. Box 1312, Coeur d'Alene, ID 83816-1312 and
William A. Von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, ID
83722.

Susan Benfro
Clerk to the Board

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.


) Case No. CV 10-9226
)
) NOTICE OF LODGING OF
) TRANSCRIPT AND AGENCY
) RECORD
)
)
)

The agency record for the above referenced case is complete. The Board of Tax Appeals decision in Appeal No. 10-B-1289, has been appealed to the First Judicial District Court of Kootenai County. A copy of the record has been prepared.

This will serve as notice that a copy of the agency record is enclosed and the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the Agency any objections.

CERTIFICATE OF MAILING

I hereby certify that I have on this 27th day of October, 2010, mailed a copy of the within and foregoing document by sending the same by United States mail, postage prepaid, in an envelope addressed to Starr Kelso, Esq., P.O. Box 1312, Coeur d'Alene, ID 83816 and William A. von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, ID 83722.


Clerk to the Board

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OCT 22 2010

IDAHO BOARD OF
TAX APPEALSTyped: 310
per
CSSTATE OF IDAHO
COUNTY OF KOOTENAI } ss
FILED:

2010 OCT 22 PM 1:20

CLERK DISTRICT COURT

DEPUTY

STARR KELSO
Attorney at Law # 2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816-1312
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant

: CASE NO. CV10-922-6

vs.

: APPEAL FROM THE IDAHO
BOARD OF TAX APPEALS
: PURSUANT TO I.C. 63-3812,
and RULE 84 Idaho Rules of
: Civil Procedure

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS
Respondents.

:

COMES NOW Appellant Philip L. Hart, a resident of the County of Kootenai, State of Idaho, by and through his attorney Starr Kelso and does hereby appeal from the Tax Commission Decision in Docket Number 21551 and Docket Number 21552, the Idaho Board of Tax Appeals Final Order Dismissing Appeal Appellant Hart's Appeal No. 10-B-1289 entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2010. Name of Agency: Idaho State Tax Commission and the Idaho Board of Tax Appeals;

1. Title of District Court: District Court For The First Judicial District Of The State Of Idaho. Jurisdiction is proper, pursuant to Idaho Code section 63-3812 (a) in this District Court because Appellant Hart is a resident of the County of Kootenai, State of Idaho.

1 APPEAL

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OCT 22 2010

IDAHO BOARD OF
TAX APPEALS

2. The actions for which judicial review is sought:

- a. BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO, In the Matter of the Protest of Philip L. Hart, Petitioner. DOCKET NOS. 21551 & 21552, DECISION dated September 30, 2009;
- b. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, FINAL ORDER DISMISSING APPEAL dated August 24, 2010;
- c. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, ORDER DENYING RECONSIDERATION dated September 24, 2010.

3. From the decision of the State Tax Commission (paragraph 3 [a] above) it appears that at least some manner of partial hearing may have been held before the State Tax Commission on July 7, 2009. It is unknown to Counsel for Appellant the extent and manner, if any, in which the possible hearing, was recorded. The State Tax Commission would presumably possess this information and record, if any. See paragraph 8 below in this regard.

4. Preliminary Statement of Issues:

- a. The applicability of, and compliance with, Idaho Constitution, Article III, Section 7, to the issuance of any deficiency notice to him by the federal government demanding a response during the time he was serving in the 2008 Idaho Legislature?;
- b. Whether the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1996 through 1998 (Docket Number 21551) and or the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1999 through 2004 (Docket Number 21552), based solely upon federal tax documentation, conform to the

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IDAHO BOARD OF
TAX APPEALS

- taxation authority granted by the State of Idaho and United States Constitutions because it, and or its result, is an unapportioned direct tax?;
- c. Whether the issuance of any deficiency notice(s), when not provided to Appellant Hart, by the federal government, are valid and or evidence of any tax owed by Appellant Hart to the State of Idaho under either or both of the cited Docket Numbers 21551 and or 21552?;
 - d. Whether the federal government's unsworn to and incorrect calculation of claimed income taxes due from Appellant is valid any evidence of any tax owed by Appellant to the State of Idaho?;
 - e. Whether the State of Idaho income tax statutes, as a graduated tax, fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution?;
 - f. Whether the State Board of Tax Appeals upheld the sanctity of Article III, Section 7 of the Idaho Constitution in failing to confirm Appellant's Constitutional obligation to his constituency?;
 - g. Whether the Idaho State Tax Commission's and the State Board of Tax Appeals affirmation thereof, acceptance of Appellant Hart's checks, and his promise to pay (which he complied with) the remainder of a required cash deposit by a taxpayer as security, without ever advising Appellant that it was not acceptable security, was a violation of its own rules, regulations, and Due Process Clauses under the Idaho and U.S. Constitutions?;
 - h. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals is estopped from asserting, and/or has waived any alleged claim of, noncompliance by Appellant Hart with the "twenty percent deposit requirement" given its acceptance of Appellant Hart's cash payments, its acceptance of the cash deposit and Appellant Hart's promise to pay (without comment and without communication from its legal department that the promise was not acceptable), and its subsequent retention of the payment of the unpaid portion of the "twenty percent deposit requirement" when Appellant Hart paid it in full as promised?;

3 APPEAL

- i. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals erroneously placed any burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 which adopts and implements U.S. Code section 7491 that changed the burden of proof in tax appeals from the taxpayer to the revenue service violated Idaho state law and further violated Appellant's due process rights under the Idaho and U.S. Constitutions?;
- j. Whether the jurisdictional prerequisite requirement of a twenty percent deposit requirement of an any taxpayer, including Appellant Hart, contesting any notice of deficiency violates Appellant Hart's constitutional rights under the Due Process clause under the Idaho and U.S. Constitutions?;
- k. Whether the State Tax Commission/Idaho Board of Tax Appeals refusal to acknowledge and accept the cash deposit filed with the State Tax Commission for at least one of the two entirely separate Docket Numbers regarding Appellant Hart, when the cash deposit was in excess of either of the individually "required" deposits, violates the statutes of Idaho, rules of the Commission and Board of Appeals, and Appellant Hart's Due Process rights under the Idaho and U.S. Constitutions.
- l. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U. S. Constitutions by not recording and/or otherwise transcribing the hearing referenced in the State Tax Commission Decision as having occurred on July 7, 2009;
- m. Whether the State Board of Tax Appeals violated the statutes of Idaho, rules of the Board, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions by not holding a hearing on Appellant Hart's appeal.
- n. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions, after (1) receiving "additional materials" from Appellant Hart on September 10, 2009, (2) without providing Appellant Hart with a further opportunity and/or hearing to discuss the

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TAX APPEALS

additional materials with it, (3) without providing Appellant Hart of its notice of intent, and (4) with knowledge on the part of the State Tax Commission that it had not received all the information requested from Appellant Hart by the State Tax Commission and/or offered to be provided the State Tax Commission by Appellant Hart, by beginning preparation of its Decision in both Dockets and then subsequent issuance of its Decision in both dockets, on September 30, 2009.

- o. Whether the State Tax Commission/State Board of Tax Appeals violated Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions, and the rules of evidence and procedure by giving consideration to unsworn representations made by the IRS and ignoring, not considering, or otherwise giving greater value and weight to the sworn to returns filed by Appellant Hart in determining tax liability, if any, of Appellant Hart.
- p. Whether Idaho Code section 63-3812 (c) erroneously places the burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 adopt and implement U.S. Code section 7491 and it has changed the burden of proof in tax appeals from the taxpayer to the revenue service and thus violates Idaho state law and further violates Appellant's due process rights under the Idaho and U.S. Constitutions?;

- 5. A transcript of any and all proceedings recorded and or transcribed by both the State Tax Commission and the Idaho State Board of Tax Appeals is requested.
- 6. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that a true and correct copy of the foregoing was made upon the Idaho State Tax Commission, and the Idaho State Board of Tax Appeals, on October 20, 2010, by regular First Class U.S. Mail, postage prepaid thereon and by fax as follows:

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

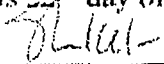
5 APPEAL

William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7846

7. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the respective representatives of the State Tax Commission and the Idaho Board of Tax Appeals that there are no transcripts or recordings in existence. Thus no estimated cost for transcripts has been paid.
8. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the representative of the State Tax Commission that its entire record was sent to the Idaho Board of Tax Appeals. The undersigned, attorney for Appellant Hart, further hereby certifies that he has been informed by the representative of the Idaho Board of Tax Appeals that there is no fee charged for the record on appeal from it.

DATED this 22nd day of October, 2010.


Starr Kelso, Attorney for Appellant Phil Hart

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TAX APPEALS

CERTIFICATE OF SERVICE: I certify that a copy of the foregoing was mailed and faxed to the following agencies and person on the 22nd day of October, 2010.

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

William A. von Tagen
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Starr Kelso

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IDAHO BOARD OF
TAX APPEALS

For file
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 1st floor
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STATE OF IDAHO
 COUNTY OF KOOTENAI
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CLERK DISTRICT COURT

DEPUTY

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART.

Appellant

: CASE NO. CV-10-9226

vs.

: APPEAL FROM THE IDAHO
BOARD OF TAX APPEALS

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS

Respondents.

: PURSUANT TO I.C. 63-3812,
 and RULE 84 Idaho Rules of
 Civil Procedure

COMES NOW Appellant Philip L. Hart, a resident of the County of Kootenai, State of Idaho, by and through his attorney Starr Kelso and does hereby appeal from the Tax Commission Decision in Docket Number 21551 and Docket Number 21552, the Idaho Board of Tax Appeals Final Order Dismissing Appeal Appellant Hart's Appeal No. 10-B-1289 entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2010. Name of Agency: Idaho State Tax Commission and the Idaho Board of Tax Appeals;

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1 APPEAL

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IDAHO BOARD OF
TAX APPEALS

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IDAHO BOARD OF
TAX APPEALS

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IDAHO BOARD OF
TAX APPEALS

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6. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that a true and correct copy of the foregoing was made upon the Idaho State Tax Commission, and the Idaho State Board of Tax Appeals, on October 20, 2010, by regular First Class U.S. Mail, postage prepaid thereon and by fax as follows:

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

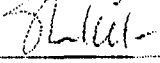
William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
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IDAHO BOARD OF
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DATED this 22nd day of October, 2010.


Starr Kelso, Attorney for Appellant Phil Hart

CERTIFICATE OF SERVICE: I certify that a copy of the foregoing was mailed and faxed to the following agencies and person on the 22nd day of October, 2010.

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P.O. Box 83720
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Fax no.: 208-334-7846


Starr Kelso

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STATE OF IDAHO
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CLERK DISTRICT COURT

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OCT 25 2010

IDAHO BOARD OF
TAX APPEALS

STARR KELSO
Attorney at Law # 2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816-1312
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS
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: CASE NO. CV10-9226
: APPEAL FROM THE IDAHO
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and RULE 84 Idaho Rules of
: Civil Procedure

COMES NOW Appellant Philip L. Hart, a resident of the County of Kootenai, State of Idaho, by and through his attorney Starr Kelso and does hereby appeal from the Tax Commission Decision in Docket Number 21551 and Docket Number 21552, the Idaho Board of Tax Appeals Final Order Dismissing Appeal Appellant Hart's Appeal No. 10-B-1289 entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2010. Name of Agency: Idaho State Tax Commission and the Idaho Board of Tax Appeals;

1. Title of District Court: District Court For The First Judicial District Of The State Of Idaho. Jurisdiction is proper, pursuant to Idaho Code section 63-3812 (a) in this District Court because Appellant Hart is a resident of the County of Kootenai, State of Idaho.

1 APPEAL

2. The actions for which judicial review is sought:

- a. BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO, In the Matter of the Protest of Philip L. Hart, Petitioner, DOCKET NOS. 21551 & 21552, DECISION dated September 30, 2009;
- b. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, FINAL ORDER DISMISSING APPEAL dated August 24, 2010;
- c. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, ORDER DENYING RECONSIDERATION dated September 24, 2010.

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3. From the decision of the State Tax Commission (paragraph 3 [a] above) it appears that at least some manner of partial hearing may have been held before the State Tax Commission on July 7, 2009. It is unknown to Counsel for Appellant the extent and manner, if any, in which the possible hearing, was recorded. The State Tax Commission would presumably possess this information and record, if any. See paragraph 8 below in this regard.

4. Preliminary Statement of Issues:

- a. The applicability of, and compliance with, Idaho Constitution, Article III, Section 7, to the issuance of any deficiency notice to him by the federal government demanding a response during the time he was serving in the 2008 Idaho Legislature?;
- b. Whether the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1996 through 1998 (Docket Number 21551) and or the Idaho State Tax Commission Income Tax Audit Bureau's Notice of Deficiency regarding taxable years 1999 through 2004 (Docket Number 21552), based solely upon federal tax documentation, conform to the

taxation authority granted by the State of Idaho and United States

Constitutions because it, and or its result, is an unapportioned direct tax?;

- c. Whether the issuance of any deficiency notice(s), when not provided to Appellant Hart, by the federal government, are valid and or evidence of any tax owed by Appellant Hart to the State of Idaho under either or both of the cited Docket Numbers 21551 and or 21552?;
- d. Whether the federal government's unsworn to and incorrect calculation of claimed income taxes due from Appellant is valid any evidence of any tax owed by Appellant to the State of Idaho?;
- e. Whether the State of Idaho income tax statutes, as a graduated tax, fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution?;
- f. Whether the State Board of Tax Appeals upheld the sanctity of Article III, Section 7 of the Idaho Constitution in failing to confirm Appellant's Constitutional obligation to his constituency?;
- g. Whether the Idaho State Tax Commission's and the State Board of Tax Appeals affirmation thereof, acceptance of Appellant Hart's checks, and his promise to pay (which he complied with) the remainder of a required cash deposit by a taxpayer as security, without ever advising Appellant that it was not acceptable security, was a violation of its own rules, regulations, and Due Process Clauses under the Idaho and U.S. Constitutions?;
- h. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals is estopped from asserting, and/or has waived any alleged claim of, noncompliance by Appellant Hart with the "twenty percent deposit requirement" given its acceptance of Appellant Hart's cash payments, its acceptance of the cash deposit and Appellant Hart's promise to pay (without comment and without communication from its legal department that the promise was not acceptable), and its subsequent retention of the payment of the unpaid portion of the "twenty percent deposit requirement" when Appellant Hart paid it in full as promised?;

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- i. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals erroneously placed any burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 which adopts and implements U.S. Code section 7491 that changed the burden of proof in tax appeals from the taxpayer to the revenue service violated Idaho state law and further violated Appellant's due process rights under the Idaho and U.S. Constitutions?;
- j. Whether the jurisdictional prerequisite requirement of a twenty percent deposit requirement of an any taxpayer, including Appellant Hart, contesting any notice of deficiency violates Appellant Hart's constitutional rights under the Due Process clause under the Idaho and U.S. Constitutions?;
- k. Whether the State Tax Commission/Idaho Board of Tax Appeals refusal to acknowledge and accept the cash deposit filed with the State Tax Commission for at least one of the two entirely separate Docket Numbers regarding Appellant Hart, when the cash deposit was in excess of either of the individually "required" deposits, violates the statutes of Idaho, rules of the Commission and Board of Appeals, and Appellant Hart's Due Process rights under the Idaho and U.S. Constitutions.
- l. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U. S. Constitutions by not recording and/or otherwise transcribing the hearing referenced in the State Tax Commission Decision as having occurred on July 7, 2009;
- m. Whether the State Board of Tax Appeals violated the statutes of Idaho, rules of the Board, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions by not holding a hearing on Appellant Hart's appeal.
- n. Whether the State Tax Commission/State Board of Tax Appeals violated the statutes of Idaho, rules of the Commission, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions, after (1) receiving "additional materials" from Appellant Hart on September 10, 2009, (2) without providing Appellant Hart with a further opportunity and/or hearing to discuss the

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TAX APPEALS

additional materials with it, (3) without providing Appellant Hart of its notice of intent, and (4) with knowledge on the part of the State Tax Commission that it had not received all the information requested from Appellant Hart by the State Tax Commission and/or offered to be provided the State Tax Commission by Appellant Hart, by beginning preparation of its Decision in both Dockets and then subsequent issuance of its Decision in both dockets, on September 30, 2009 .

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IDAHO BOARD OF
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- o. Whether the State Tax Commission/State Board of Tax Appeals violated Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions and the rules of evidence and procedure by giving consideration to unsworn representations made by the IRS and ignoring, not considering, or otherwise giving greater value and weight to the sworn to returns filed by Appellant Hart in determining tax liability, if any, of Appellant Hart.
- p. Whether Idaho Code section 63-3812 (c) erroneously places the burden of proof on Appellant Hart because Idaho Code 63-3002 and Idaho Code 63-3004 adopt and implement U.S. Code section 7491 and it has changed the burden of proof in tax appeals from the taxpayer to the revenue service and thus violates Idaho state law and further violates Appellant's due process rights under the Idaho and U.S. Constitutions?;

- 5. A transcript of any and all proceedings recorded and or transcribed by both the State Tax Commission and the Idaho State Board of Tax Appeals is requested.
- 6. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that a true and correct copy of the foregoing was made upon the Idaho State Tax Commission, and the Idaho State Board of Tax Appeals, on October 20, 2010, by regular First Class U.S. Mail, postage prepaid thereon and by fax as follows:

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

5 APPEAL

William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7846

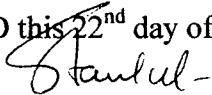
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7. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the respective representatives of the State Tax Commission and the Idaho Board of Tax Appeals that there are no transcripts or recordings in existence. Thus no estimated cost for transcripts has been paid.
8. Certification: The undersigned, attorney for Appellant Hart, hereby certifies that he has been informed by the representative of the State Tax Commission that its entire record was sent to the Idaho Board of Tax Appeals. The undersigned, attorney for Appellant Hart, further hereby certifies that he has been informed by the representative of the Idaho Board of Tax Appeals that there is no fee charged for the record on appeal from it.

DATED this 22nd day of October, 2010.



Starr Kelso, Attorney for Appellant Phil Hart

CERTIFICATE OF SERVICE: I certify that a copy of the foregoing was mailed and faxed to the following agencies and person on the 22nd day of October, 2010.

State of Idaho
Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088
Fax no. : 208-334-4060

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IDAHO BOARD OF
TAX APPEALS

William A. von Tagen
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7844

State of Idaho Tax Commission
800 Park Plaza IV
P.O. Box 36
Boise, Idaho 83722
Fax no.: 208-334-7846



Starr Kelso

KELSO LAW OFFICE

STARR KELSO

Attorney at Law

"Never Give Up—Never Give In"

1621 N. THIRD STREET, SUITE 600
POST OFFICE BOX 1312
COEUR D'ALENE, ID 83816-1312
Telephone: (208)765-3260
Facsimile: (208)664-6261
E-Mail kelsolawoffice@gmail.com

STEPHANIE GOSSARD
Office Manager
♦
MATT KELSO

October 19, 2010

State of Idaho Board of
Tax Appeals
3308 Americana Terrace
PO Box 83720
Boise ID 83720-0088

Attn: Susan

Via Fax 208-334-4060

Re: PHIL HART
APPEAL NO: 10-B-1289

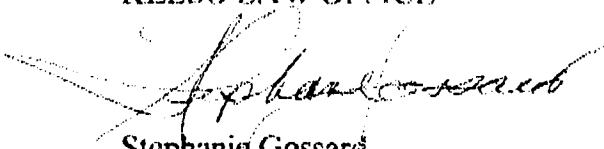
Dear Susan,

This will confirm our conversation of this date wherein our office had inquired as to the cost of any transcripts of any hearings in the above matter. You indicated that there would be no cost and there were no transcripts.

If this letter does not reflect the conversation stated above, please immediately contact this office.

Very truly yours,

KELSO LAW OFFICE


Stephanie Gossard
Assistant to Starr Kelso
/hrs

BEFORE THE IDAHO BOARD OF TAX APPEALS

IN THE MATTER OF THE APPEAL OF PHILIP	)	APPEAL NO. 10-B-1289
HART from the decision of the Idaho State Tax)	
Commission assessing additional income tax,	)	ORDER DENYING
penalty, and interest for taxable years 1996	)	RECONSIDERATION
through 2004.		

On August 24, 2010, this Board issued a final order dismissing the above-captioned appeal..

On September 3, 2010, the Board received from Appellant a motion for reconsideration. Respondent did not file a response.

Idaho Code § 63-3810 and BTA Rule 145 address rehearing and reconsideration. Board policy is that a motion for rehearing should be denied except on a strong showing of omission of evidence, unfair treatment by a hearing officer, failure of the Board to consider all the evidence that has been presented, or failure to consider all dispositive issues.

The Board believes it understands the pertinent law and facts presented, with one exception, as corrected by Appellant in his motion for reconsideration, the last day to file the appeal was January 1, 2010, but because that was a legal holiday, the last day to file the appeal was January 4, 2010. The correction is not crucial to this Board's final decision. This Board finds no reason to grant the motion for reconsideration.

NO GOOD CAUSE HAVING BEEN SHOWN, this Board DENIES the motion for reconsideration, AND IT IS SO ORDERED.

DATED this 24th day of September, 2010.

IDAHO BOARD OF TAX APPEALS


LYLE R. COBBS


DAVID E. KINGHORN

NOTICE OF APPEAL PRIVILEGES

Enclosed is a final order of the Idaho Board of Tax Appeals concerning an appeal(s.)

Motion for reconsideration of the hearing record or motion for rehearing the appeal (with good cause detailed) may be made by filing such motion with the clerk of the Board within ten (10) days of mailing of the Final Decision and Order, with a copy of the motion being sent to all other parties to the proceeding before the Board.

According to Idaho Code § 63-3812, either party can appeal to the district court from this decision/order. Pursuant to Idaho Code § 63-3812, the appeal shall be taken and perfected in accordance with Rule 84 of the Idaho Rules of Civil Procedure.

tv

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2010 I caused to be served a true copy of the foregoing ORDER DENYING RECONSIDERATION by the method indicated below and addressed to each of the following:

Philip Hart
2900 Government Way #262
Coeur d'Alene ID 83815

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ STATEHOUSE MAIL

Starr Kelso
P.O. Box 1312
Coeur d'Alene ID 83816

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ STATEHOUSE MAIL

William A. von Tagen
Idaho State Tax Commission
P.O. Box 36
Boise, ID 83722

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ STATEHOUSE MAIL

C. Male

STARR KELSO

ATTORNEY AT LAW
1621 NORTH THIRD STREET, SUITE 600
POST OFFICE BOX 1213
COEUR D'ALENE, IDAHO 83816-1312
PHONE (208) 765-3260
FAX (208) 664-6261

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IDAHO BOARD OF
TAX APPEALS

Faxed
CO

FACSIMILE

TO: IDAHO BOARD OF TAX APPEALS

FAX NUMBER: 208-334-4060

FROM: STARR KELSO

PAGES (including cover page): 7

RE: HART V. IDAHO STATE TAX
COMMISSION

DATE: September 3, 2010

PLEASE CONFIRM RECEIPT
THANK YOU

CONFIDENTIALITY NOTICE: This facsimile transmission (and the materials attached to it) are private and confidential. The information contained in the materials is privileged and is intended only for the use of the individual(s) or entity(ies) named above. If you are not the intended recipient, be advised that the unauthorized use, disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this facsimile transmission in error, please immediately notify us by telephone (208)765-3260 to arrange for the return of the transmitted documents.

STARR KELSO
 Attorney at Law #2445
 P. O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

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IDAHO BOARD OF
TAX APPEALS

Attorney for Appellant Mr. Hart

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART
 Appellant

: APPEAL NO. 10-B-1289

Vs.

: APPELLANT MR. HART'S MOTION
: FOR RECONSIDERATION

IDAHO STATE TAX COMMISSION :
 Respondent :

COMES NOW Appellant Philip L. Hart (Mr. Hart) by and through his attorney Starr Kelso and hereby submits his Motion to Reconsider the Board of Tax Appeals dismissal of Mr. Hart's appeal. The dismissal was in clear error, and Mr. Hart requests the Appeals Board to reconsider its decision.

ARGUMENT

DATE COMPUTATION FOR APPEAL:

The Board reasoned in their Final Order Dismissing Appeal that Mr. Hart failed timely file his appeal. The Board stated that Mr. Hart's last day to file was Friday, January 1, 2010.

January 1, 2010 is a legal holiday. It would have been impossible for Mr. Hart to have filed an appeal on January 1, and the law cannot require the impossible. The Board's rules state at 005 that the Board's office is closed "Saturday, Sunday and legal holidays."

The Idaho Court Rules are very clear as to what to do in such a circumstance. Rule 6(a) provides that "The last day of the period so computed is to be included, unless it is a Saturday, a

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Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a holiday.”

The appeal filing deadline was thus Monday, January 4, 2010. January 4, 2010 is three days beyond January 1, 2010. Even the opposing party, the Tax Commission, agrees that absent the affect of Article III section 7 of the Idaho Constitution that the filing deadline was Monday January 4, 2010.

As the Board noted, the 2010 legislative session began on Monday January 11, 2010. When counting days in reverse, the rule in the Idaho Court Rules provides that when a time period ends on a holiday, that the time period should include the day after a holiday. This extends the protected time period back to December 30, 2009, as December 31 should be included in the protected time period. The overlap of the two time periods, the one going forward and the other going backward, is five days. There were therefore five business days following the end of the legislative session for Mr. Hart to file his appeal.

Mr. Hart did file his appeal on the second day after the end of the legislative session, and the appeal was therefore timely filed.

Eleven states have a provision in their state constitution which allow for a postponement of a civil process for a legislator while the legislature is in session. There are no cases in Idaho that address this on point. But there are numerous other cases from the other ten states. All support Mr. Hart's actions. All of the relevant authorities support Mr. Hart's actions. In fact, there are no authorities that contradict the supporting authorities.

We have already adequately briefed this issue in earlier filings, but will include here a few relevant quotes.

“These similar constitutional provisions convince us the immunity was granted by our constitution to protect the legislators from distraction during the stated periods of time and should be broadly construed. Immunity from service of ‘any civil processes’ should be granted during the constitutionally described time period.” *Seaman's v. Walgreen*, 82 Wn.2d 771, 774 (1973).

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IDAHO BOARD OF
TAX APPEALS

"In precise terms article IV, section 14, creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs." *Harmer v. Superior Court of Sacramento*, 79 Cal. Rptr. 855, 857 (1969).

"The state is clearly entitled to the services of its members of the legislature during the time sessions of either branch thereof are being held. Our constitution has wisely provided that the members shall not be annoyed with arrests or suits, or be obliged to be absent from their duties.... The interests of the public are better served by giving the language of our constitution its fair, natural meaning; that is, that a member of the legislature is not liable or subject to the service of civil process during the excepted period, and that the service of original process upon him at such time is void, and gives the court no jurisdiction over the person of such member." *Cook v. Senior*, 45 P. 126, 128 (1896).

"The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before and after, so that the state could have their undivided time and attention in public affairs." *Fuller v. Barton*, 208 N.W. 696, 697 (1926), 240 Mich. 540 (1926).

"We conclude, as did the court of appeals, that the rationale for the privilege was to preserve the public's right to representation in the state legislature during the session of the legislature. When a legislator cannot appear the people whom the legislator represents lose their voice in debate and vote." *State v. Beno*, 341 N.W.2d 668, 676 (1984), 116 Wis.2d, 122 (1984).

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In a published opinion, the Attorney General for the state of Alaska ^{IDAHO BOARD OF TAX APPEALS} far as to say that invoking this constitutional provision was mandatory: "Such immunity can not be waived by the legislator since the Alaska immunity is intended to protect the public as well as serve the convenience of the legislators." 1959 Op. Att'y Gen. No. 8.

The Idaho Court Rules of Civil Procedure also acknowledge that an attorney/legislator needs time when the legislative session is over to catch up with the affairs of their private life. Idaho legislators are citizen legislators, most of whom make their living working at other professions. Rule 5(g) provides for, in some circumstances, a ten day extension of constitutional provision found at Article III, section 7 at the end of a legislative session.

The Appeal was timely filed.

FILING OF DEPOSIT:

Mr. Hart filed two checks, one for \$7,862.04 and one for \$1,600.00, the day after the legislative session ended. The remaining amount, \$ 1,962.36, was paid April 9th. As explained in the March 30, 2010 letter to the Board, Mr. Hart needed to return home to the Coeur d'Alene area during business hours to access the remaining amount.

The filed checks constituted 83 percent of the twenty percent and represented substantial compliance with the deposit requirement. The letter Mr. Hart attached with the first payment contained all the elements of a promissory note. In this letter Mr. Hart promised to pay the remaining deposit amount within nine business days, which would be April 9th. Mr. Hart did in fact keep this promise and the entire deposit was paid by April 9th. Since he received no notice to the contrary, Mr. Hart presumed that promissory note/letter was acceptable security to the Board under the Rules of the Board of Tax Appeals. Rule 021 states that "These rules will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board." Idaho Code section 63-3049 (a) specifically provides for "other type of security" in lieu of a cash deposit. Mr. Hart had no way of knowing that this promise, complied with, was not acceptable "other type of security."

There is a stated bias in American law that one is to have their day in court. "Appeals are favored in law and should be liberally construed," *Schroff v. Smart*, 120 S.W.3d 751, 755 (Mo.App. 2003).

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IDAHO BOARD OF
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"The articles of the Code of Civil Procedure are to be construed liberally and are not an end in themselves. The right to appeal has constitutional sanction. Appeals are to be favored in the law and aided by the courts." *Traigle v. Gulf Coast Aluminum Corp.*, 399 So.2d 183, 186 (La. 1981).

The Idaho Rules of Civil Procedure [1(a)] provide that the "rules shall be liberally construed" to secure a "just" determination of every proceeding. The Board's own rule, Rule 021 provides exactly the same. "These rules are to be liberally construed".

All deposits were cashed, maintained, and never returned to Mr. Hart. No objection was stated to any of the payments. Under fundamental principles of equitable estoppel and the lack of any objection or return of the money bars a claim of lack of compliance. Liberal construction requires that the Board hear this appeal.

TWO SEPARATE APPEALS:

The appeals involve two separate appeals and two separate dockets, numbers 21551 and 21552. Clearly the deposit was filed on the docket number 21551. It was substantially met on docket number 21552. The small difference in the payment, given full payment of the first docket and the vast majority of the second docket with an unobjected to promise to pay after full and complete compliance with the first docket number is yet another reason why Mr. Hart felt that his promise was sufficient other security.

Additionally, as pointed out originally, Idaho income tax piggybacks onto the federal income tax. This is affirmed by the Idaho Code at 63-3002 and 63-3004. Congress, by way of the Restructuring and Reform Act of 1998, shifted the burden of proof onto the IRS. And since the Idaho Code incorporates the Internal Revenue Code, the burden of proof has therefore been shifted to the Tax Commission and any deposit is not required. In other words a taxpayer is presumed innocent, not guilty.¹

¹ The Tax Commission has based their claim that Mr. Hart owes monies to the state of Idaho on an unsworn audit examination report prepared by the IRS. Such an unsworn audit examination report constitutes hearsay evidence. In Mr. Hart's Response to the Tax Commission's Notice of Deficiency Determination submitted July 6, 2009 and September 5, 2009, Mr. Hart adequately explained that the IRS audit examination report, which denied 100 percent of Mr. Hart's business deductions for eight years, was entirely the result of political persecution of Mr. Hart by the IRS. See the letter from Mr. Wayne Paul, CPA. Mr. Paul verified that Mr. Hart was in fact denied 100 percent of his business deductions for the audited eight years. Mr. Paul explains that it is

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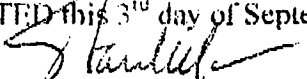
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IDAHO BOARD OF
TAX APPEALS

CONCLUSION

The Board of Tax Appeals Dismissal Order should be reconsidered and reversed. Mr. Hart is entitled to his Appeal.

DATED this 3rd day of September, 2010.



Starr Kelso

CERTIFICATE OF SERVICE: I hereby certify that I have this 3rd day of September, 2010, upon all parties to this proceeding by fax to:

William A. von Tugen
Deputy Attorney General
Attorney for Idaho State Tax Commission
208-334-7844 / 2690



Starr Kelso

impossible for Mr. Hart to conduct himself in the business world for eight years without a single dollar of expense. The Tax Commission provided no evidence to substantiate the conclusions of the IRS audit examination report and therefore did not meet their burden of proof. Requiring any tax payer to pay a 20 percent appeal deposit on an alleged tax liability that is imposed for solely for political persecution is unjust on its face. If a fabricated tax liability of one million dollars was based on an unsworn document constituting hearsay evidence, should the tax payer have to deposit a \$200,000 sum in order to have the opportunity to appeal to a court of law where the rules of evidence might give the tax payer a fighting chance?

BEFORE THE IDAHO BOARD OF TAX APPEALS

IN THE MATTER OF THE APPEAL OF PHILIP	)	APPEAL NO. 10-B-1289
HART from the decision of the Idaho State Tax)	
Commission assessing additional income tax,	)	FINAL ORDER
penalty, and interest for taxable years 1996 through	)	DISMISSING APPEAL
2004.)	

Notice of appeal was filed by Appellant on March 31, 2010. The appeal is taken from an adverse decision of the Idaho State Tax Commission (STC) dated September 30, 2010 (Docket No. 21551.)

Motion to dismiss the appeal was filed by the STC on April 15, 2010. Respondent argued the appeal was not timely filed in accordance with the requirements of Idaho Code § 63-3049. Nor was the 20% pre-pay requirement set forth in the same code section. The motion was supported by a staff affidavit.

Appellant argued the appeal was timely filed in compliance with applicable law because pursuant to Article 111, Section 7 of the Idaho Constitution, the statute of limitations concerning civil proceedings was tolled until the end of the legislative session, which began on January 11, 2010. Respondent contended legislative immunity was not applicable under the circumstances.

The courts have not had occasion to opine on the application of legislative immunity to the type of circumstances presented here. Likewise, this Board will not make a finding regarding the validity of the argument. Even if Appellant's position is accepted *arguendo*, we find the appeal untimely.

Appellant acknowledged receipt of the STC's decision on October 2, 2009. According to section 63-6049, I.C., Appellant had to file an appeal with the Board "within ninety-one (91) days after receipt of notice of the decision of the state tax commission" Therefore, January 1, 2010 was the last day in which Appellant could timely file an appeal. As noted earlier, the

legislature convened on January 11, 2010. Accepting *arguendo* Appellant's position that legislative immunity applies to this case, legislators are immune from civil proceedings both during the legislative session and ten (10) days prior to the commencement thereof. Thus, the tolling of the statute of limitations began on January 1, 2010, which was also the ninety-first day after Appellant's receipt of the STC decision. The legislative session ended on March 29, 2010, meaning Appellant had until no later than March 30th to file a timely appeal, given that ninety-one days had already passed by the time the statute of limitations would have begun to toll on January 1, 2010.. Appellant filed the appeal on March 31, 2010.

Even more compelling is Appellant's failure to fulfill the 20% pre-pay requirement until April 14, 2010, roughly two (2) weeks after the filing deadline had lapsed. On its face it appears Appellant's appeal was untimely filed on both counts. The Board is without jurisdiction to hear this appeal.

A question of jurisdiction is fundamental; it cannot be ignored when brought to the court's attention and should be addressed prior to considering the merits of an appeal. The statute contains no waiver or exception to the filing standards.

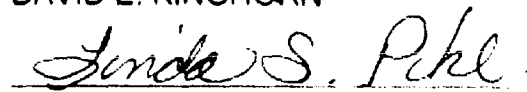
Good cause having been shown, IT IS ORDERED that this matter be, and the same hereby is, DISMISSED.

DATED this 24th day of August, 2010.

IDAHO BOARD OF TAX APPEALS


LYLE R. COBBS


DAVID E. KINGHORN


LINDA S. PIKE

NOTICE OF APPEAL PRIVILEGES

Enclosed is a final order of the Idaho State Board of Tax Appeals concerning an appeal.

Motion for reconsideration of the hearing record or motion for rehearing the appeal (with good cause detailed) may be made by filing such motion with the Clerk of the Board within ten (10) days of mailing of the Final Order, with a copy of the motion being sent to all other parties to the proceeding before the Board.

According to Idaho Code § 63-3812, either party can appeal to the district court from this final order. Pursuant to Idaho Code § 63-3812, the appeal shall be taken and perfected in accordance with Rule 84 of the Idaho Rules of Civil Procedure.

tv

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2010 I caused to be served a true copy of the foregoing FINAL ORDER DISMISSING APPEAL by the method indicated below and addressed to each of the following:

Starr Kelso Esq.
P.O. Box 1312
Coeur d'Alene ID 83816

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ STATEHOUSE MAIL

William A. von Tagen
Idaho State Tax Commission
P.O. Box 36
Boise, ID 83722

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FROM: STARR KELSO PAGES (including cover page): 7

RE: PHIL HART Appeal # 10 B 1289 DATE: August 6, 2010

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August 6, 2010

State of Idaho
Board of Tax Appeals
Via Fax: 208-334-4060

RE: Appeal No. 10-B-1289
Philip L. Hart

Dear Reader:

With the passage of time since my June 21, 2010 letter more information regarding legislative immunity clauses in state constitutions has been chronicled. I am herewith providing you with a copy of a recent article by an attorney legislator in the State of Washington and a cite to it's location on the internet.

citation: www.voteshea2010.com/PDF/Legislative%20Immunity.pdf

Thank you.

Very truly yours,


Starr Kelso

Attorney at Law

c: William A. von Tegen via fax: 208-334-7844

Philip L. Hart

This document can be found on Rep. Matt Shea's website at:
www.voteshea2010.com/PDF/Legislative%20Immunity.pdf



Legislative Immunity: Who Benefits?

Recently, an oft quoted myth has resurfaced that legislative immunity is a perk for State Representatives which can be invoked whenever convenient. For example, this myth is being used as the basis for accusations of impropriety being leveled against Idaho State Representative Phil Hart (3rd H.D.)

Rep. Hart has relied on a provision in the Idaho Constitution to postpone an income tax controversy he is involved in until after the conclusion of the legislative session. Both Washington and Idaho legislators are protected from "any civil process" while their legislatures are in session. As a threshold matter of state sovereignty that protection also includes civil process attempted by the federal government.

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State Constitutions

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Article 2, Section 16 of the Washington Constitution reads:

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TAX APPEALS

Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; *they shall not be subject to any civil process during the session of the legislature,* nor for fifteen days next before the commencement of each session.

Similarly Article III, Section 7 of Idaho's Constitution reads:

Senators and representatives in all cases...shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof...

There are eleven states that have similar language in their respective constitutions which use the phrase "any civil process." An I.R.S. decision on what Rep. Hart's allowable business deductions are is administrative in nature and clearly a civil matter because it involves an attempt to take property. It is therefore, "any civil process."

The History of and Reasons for Legislative Immunity

Our Founding Fathers just freed from English tyranny wanted to ensure that elected Representatives would not face arbitrary arrest for the sake of political retribution.

As stated by the United States Supreme Court:

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from

the Crown, its statement of the privilege grew stronger. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale v. Hansard*, 9 Ad. & El. 1, 113-114 (1839)... Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

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The Founding Fathers also wanted to ensure that the people's voice was protected and uninhibited:

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." *Id.* at 373.

The court continued in summary "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial... [Emphasis added] *Id.* at 377.

This idea has been affirmed time and again in many states.

In Wisconsin the Speaker of the House's office received a subpoena for one of the speaker's administrative assistants related to an audit of a lobbyist's tax return. The Speaker took the position that his administrative assistant was his alter ego and should be protected by the constitutional provision that a member of the legislature not be "subject to any civil process, during the session of the legislature...." The Supreme Court of Wisconsin agreed with the Speaker.

"...the meaning of a constitutional provision may be determined by looking at the objectives of the framers in adopting the provision. We conclude, as did the court of appeals, that the rationale for the privilege was to preserve the public's right to representation in the state legislature. **When a legislator cannot appear the people whom the legislator represents lose their voice in debate and vote.**" [Emphasis added] *State v. Beno*, 341 N.W. 2d 668 (1984).

In Michigan there was a legislator who had a garnishment on his wages. The judgement was in place before the legislative session started. The Attorney General for the state of Michigan defended the legislator because the garnishment was viewed more as an attack against the legislative branch of government as opposed to an attack on the legislator. The Michigan Constitution uses the same "any civil process" language used in Idaho and Washington. Here is what the Michigan Supreme Court said of the garnishment:

"This is too narrow view of the situation. The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before and after, so that the state could have their undivided time and attention in public affairs." *Fuller v. Barton*, 208 N.W. 696 (1926).

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In Arizona and Wisconsin the Attorneys General agreed that a garnishment shall not be allowed on a legislator's paycheck during the legislative session in their respective states. The Arizona Attorney General cited the *Fuller v. Barton* case as his authority. "It is my opinion that the Arizona constitutional provision prohibits garnishment proceedings, and, therefore, you should not honor any garnishments involving any legislator during the sessions of the Legislature." *Arizona, Opinion of Attorney General*, No. 56-24.

In Kansas the point is made again that the immunity provision of their constitution is for the benefit of the state and of the people that the legislator represents.

The use of the words "subject to" means that the member is not "liable to" the service of civil process. To construe our constitution differently would be to defeat its apparent object. The state is clearly entitled to the service of its members of the legislature during the time sessions of either branch thereof are being held. Our constitution has wisely provided that the members shall not be annoyed with arrests or suits, or be obliged to be absent from their duties...."
Cook v. Senior, 45 P. 126, 127-8 (1896).

In California the language in that state constitution reads "A member of the Legislature is not subject to civil process during a session of the Legislature or for 5 days before and after a session." The California Court of Appeals said:

In precise terms article IV, section 14, creates an exception from civil process without qualification as to the kind of subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs. "...such immunities are designed to benefit the public by protecting legislators against compelled distraction and interference during the session." *Harmer v. Superior Court*, 79 Cal. Reporter 855 (1969).

And finally in my state, **Washington**, a member of the Washington Senate, was sued for legal malpractice because he filed a lawsuit after the statute of limitations had expired. Senator

Gordon Walgren, in his capacity as an attorney, argued successfully that the statute of limitations tolls (is postponed) while he was tied up with the business of the legislature.

These similar constitutional provisions convince us that immunity was granted by our constitution to protect the legislators from distraction during the stated periods of time and should be broadly construed. Immunity from service of "any civil process" should be granted during the constitutional described time periods. When a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right... *Seamans v. Walgren*, 82 Wn.2d 771, 774 (1973).

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This is exactly the case with Representative Phil Hart. The deadline to appeal given by the IRS or the Idaho Tax Commission should toll (be postponed) during the legislative session. Otherwise, Rep. Hart would have likely missed votes and debate to address his tax litigation. However, it is important to also note that this constitutional provision cannot be waived. For example:

In Alaska, that Attorney General says the legislator has no flexibility. According to him, exercising the immunity from civil process is mandatory. "Immunity against civil process cannot be waived by the legislator since the Alaska immunity is intended to protect the public as well as serve the convenience of the legislators." *Alaska, Attorney General Opinion*, 159 Op. Att'y Gen. No. 8.

Conclusion

Rep. Hart has relied on the legislative immunity provision of the Idaho Constitution to postpone working on his own tax issues, which have been ongoing for a few years. There is no question that it is within the sovereign power of the states to afford this protection. Furthermore, the law seems to be clearly on Rep. Hart's side. So why does the witch hunt continue? Has the I.R.S. ever been used as a weapon for political retribution? Both President Richard Nixon¹ and President Bill Clinton were accused of this.²

For a man who wrote a book challenging the I.R.S. definition of "income,"³ to face an arbitrary I.R.S. denial of normal business deductions⁴ and then not be allowed to appeal that decision because the I.R.S. ignores the Idaho Constitution while he is in legislative session... is a glimpse into the future of an Obama nation. Remember Obama's request for 16,000 additional I.R.S. agents?

Not only are Rep. Hart's accusers in error, but the entire situation substantiates the very reason legislative immunity was written into the constitution in the first place... to prevent political persecution.

Matt Shea is an Army combat veteran, practicing attorney, and State Representative for the 4th Legislative District in Spokane Valley, Washington.

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¹ http://en.wikipedia.org/wiki/Nixon's_bureaucracy_List

² <http://archive.newstax.com/archives/articles/2007-4-22-2001-10-10.html>

³ <http://www.constitutionalliance.org/>

⁴ It has been reported in the press that the IRS's denial of 100% of Rep. Hart's business deductions over an eight year period was political payback after Rep. Hart's refusal to turn over the names and addresses of those who purchased his book. Now both the IRS and the Idaho Tax Commission are attempting to impose the income tax on the amount of these denied deductions which totals approximately \$300,000.

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COMPANY: State of Idaho	DATE: JUNE 21, 2010
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RE: APPEAL # 10-B1289 PHIL HART	YOUR REFERENCE NUMBER:

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NOTES/COMMENTS:

cc.
William A von Tegen Via Fax 208 334-7844
Phil Hart

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CM



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Attorney:

Starr Kelso

"Never Give Up, Never Give In"

June 21, 2010

State of Idaho
Board of Tax Appeals
Via Fax: 208-334-4060

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IDAHO BOARD OF
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RE: Appeal No. 10-B-1289
Philip L. Hart

Dear Reader:

I am providing you with citations to cases that I have recently located that support the position of Mr. Hart regarding the Tax Commission's motion to dismiss.

1. *Seamans v. Walgren*, 82 Wn. 2d 771, 774, 514 P.2d 166 (1973)
...the immunity was granted by our constitution to protect the legislators from distraction during the stated periods of time and should be broadly construed. Immunity from service of "any civil process" should be granted during the constitutionally described time periods.
2. *Harmer v. Superior Court*, 79 Cal. Rptr. 855, 857 (1969)
In precise terms article IV, section 14, creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs....such immunities are designed to benefit the public by protecting legislators against compelled distraction and interference during the session.

I am also forwarding copies of these two cases, as well as a copy of the respective articles and sections of the Washington and California constitutions, for your convenience.

Very truly yours,


Starr Kelso

C: William A. von Tagen via fax:208-334-7844

Philip L. Hart

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TAX APPEALS

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Seamans v. Walgren, 82 Wn.2d 771, 514 P.2d 166 (Wash. 1973)**82 Wn.2d 771 (Wash. 1973)****514 P.2d 166****Richard O. SEAMANS, Respondent,****v.****Gordon L. WALGREN et al., Petitioners.****No. 42716.****Supreme Court of Washington, En Banc.****September 13, 1973**

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TAX APPEALS**[514 P.2d 167]****Page 772**

McMullen, Brooke, Knapp & Grenier, E. H. Knapp, Jr., Seattle, for petitioners.

Reed, McClure, Mocerri & Thonn, P.S., William R. Hickman, Ron J. Perey, Seattle, for respondent.

UTTER, Associate Justice.

Gordon Walgren appeals from a denial of his motion for summary judgment in his favor by the trial court.

The issues involved on appeal are whether a legislator is immune from the service of any civil process during stated times before and during the legislative session, and if so immune, whether such immunity would toll the running of the statute of limitations during those periods of immunity. We hold a legislator, under the facts of this case, is immune from service of civil process, but that the statute of limitations is tolled during the period of immunity.

Richard Seamans was injured in an accident on February 13, 1966 and retained Gordon Walgren, an attorney and state senator, to prosecute his claim. ^[1] The 3-year statute of limitations expired February 13, 1969 and Seamans alleges Walgren was guilty of malpractice for allowing the statute of limitations to run.

The complaint in the malpractice action was filed during the first week of January 1972 and substituted service was made upon appellant on January 7, 1972 by leaving a copy of summons and complaint with appellant's wife at their residence. On January 7, 1972, the date of service on appellant by substituted process, he was a member of the state legislature which commenced its 1972 session on January 10, 1972 and which continued until February 23, 1972. On February 29, 1972, appellant answered the complaint and pleaded respondent lacked jurisdiction over his person, insufficient

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<http://www.lawriter.net/CaseView.aspx?scd=WA&DocId=12187&Index=%5c%5c192%2c1...> 6/19/2010

process of service and that respondent's actions were barred by the statute of limitations. On September 23, 1972, valid personal service was made on appellant.

The trial court held that article 2, section 16 of the Washington State Constitution could be interpreted to make the January 7, 1972 substituted service effective. It also held that the statute of limitations was tolled during the period a legislator was immune from civil process by virtue of RCW 4.16.230. [2]

Respondent argues that article 2, section 16 does not provide immunity from service of process. That section states:

PRIVILEGES FROM ARREST. Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

It is argued the legislative intent of the framers of the constitution was to protect the legislator from significant interference such as physical arrest and removal of a legislator from the legislative chambers. The basis for this assertion is that at the time the constitution was drafted, a legislator was subject to arrest and bail for civil process, [3] and the immunity privilege should be strictly limited to such interferences.

[514 P.2d 168] We cannot so construe our constitutional provision. Article 4, section 14 of the California State Constitution provides: 'A member of the Legislature is not subject to civil process during the session of the Legislature or for 5 days before and after a session.' Their court in *Harmer v. Superior Court*, 275 Cal.App.2d 345, 348, 79 Cal.Rptr. 855, 857 (1969), noted that:

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article IV, section 14, creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. . . . While conveying incidental personal advantage, such immunities are designed to benefit the public by protecting legislators against compelled distraction and interference during the session.

The 1908 Michigan State Constitution, article 5, section 8, provides:

Senators and representatives shall in all cases, except for treason, felony or breach of the peace, be privileged from arrest during sessions of the legislature and for fifteen days next before the commencement and after the termination thereof. They shall not be subject to any civil process during the same period.

In *Auditor General v. Wayne Circuit Judge*, 234 Mich. 540, 542, 208 N.W. 696, 697 (1926), the court noted:

The idea back of the constitutional provision was to protect the legislators from the trouble, worry and inconvenience of court proceedings during the session, and for a certain time before and after, so that the State could have their undivided time and attention in public affairs.

These similar constitutional provisions convince us the immunity was granted by our constitution to protect the legislators from distraction during the stated periods of time and should be broadly construed. Immunity from service of 'any civil process' should be granted during the constitutionally described time periods.

A question is raised by respondent about the possible application of this rule if a continuing legislative session is created by law. We do not decide that question at this time. However, it has been observed in *Harmer v. Superior Court*, Supra, 275 Cal.App.2d at page 349, 79 Cal.Rptr. at page 857, that 'Laws creating an immunity from judicial process, however temporary, inevitably trench upon the judicial function, hence may encounter constitutional objections.' *Thurmond v. Superior Court*, 66 Cal.2d 836, 839-840, 59 Cal.Rptr. 273, 427 P.2d 985 (1967); *Granai v. Witters, Longmoore, Akley & Brown*, 123 Vt. 468, 194 A.2d 391 (1963).

Respondent contends that even if immunity from

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service is granted to appellant Walgren, the operation of the statute of limitations was tolled during appellant's period of immunity from service of process and, therefore, the September 23, 1972 service of process upon him was effective to bring him into this action. We agree. Although generally exceptions to a statute of limitations will not be implied, nevertheless where there is an inability to bring a lawsuit this rule is not applied and exceptions are created.

When a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases. *Braun v. Sauerwein*, 77 U.S. (10 Wall) 218, 19 L.Ed. 895 (1869); *Amy v. Watertown (No. 2.)*, 130 U.S. 320, 9 S.Ct. 537, 32 L.Ed. 953 (1889); *Wagner v. New York, Ont. & W. Ry.*, 146 F.Supp. 926 (M.D. Pa. 1956); *Davis v. Wilson*, 349 F.Supp. 905 (E.D. Tenn. 1972).

The policy of adding to the time stated in the statute, the period of disability, is reflected in RCW 4.16.230, which provides 'When the commencement of an action is [514 P.2d 169] stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.' Appellant was immune from service of process 321 days between February 13, 1969 and February 13, 1972, the period of the running of the statute of limitations. Since appellant was personally served on September 23, 1972, 223 days after February 13, 1972, the statute of limitations had not run by that time and the lower court properly obtained jurisdiction over him. The period of time appellant was unavailable for service is properly added to determine the length of time the statute has been tolled.

With regard to RCW 4.16.180, which tolls the statute of limitations during periods of concealment or absence from this state, we have stated in *Summerrise v. Stephens*, 75 Wash.2d 808, 811, 454 P.2d 224, 226 (1969):

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The rationale of the tolling statute is that every absence from the state (or a period of hiding or concealment within the state) which prevents a plaintiff from making a service upon a defendant--that would give our courts an in personam jurisdiction--should be excluded in computing the time within which a plaintiff must commence his action.

Appellant contends that this action was never properly commenced against him inasmuch as there was a failure to comply with RCW 4.16.170. That statute provides:

Tolling of statute--Actions, when deemed commenced or not commenced. For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

This statute does not, however, apply to this case. The only sanction provided, by the terms of the statute itself, is that if the complaint is not served within the 90--day period 'the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.'

Inasmuch as we have ruled the statute of limitations had not run as of September 23, 1972, the date of service of the complaint, the problem the statute addresses itself to is not an issue in this case. *Bethel v. Sturmer*, 3 Wash.App. 862, 864, 479 P.2d 131 (1970) does not announce a contrary rule. In that case, it was important for the statute of limitations to be tolled by service on the defendant within 90 days

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following the filing of the complaint. That additional tolling of the statute is not necessary in this case.

Judgment affirmed.

HALE, C.J., and FINLEY, ROSELLINI, HUNTER, HAMILTON, STAFFORD, WRIGHT, and BRACHTENBACH, JJ., concur.

Notes:

[1] Walgren will hereafter be referred to as appellant and Seamans as respondent.

[2] RCW 4.16.230, 'Statute tolled by judicial proceedings. When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.'

[3] Code of 1881, ch. 9, §§ 115--141. Repealed 1927.

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§ 16. PRIVILEGES FROM ARREST.

WASHINGTON STATE CONSTITUTION

Article II. LEGISLATIVE DEPARTMENT

Current through 2009

§ 16. PRIVILEGES FROM ARREST

Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace: they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

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Harmer v. Superior Court In and For Sacramento County, 79 Cal.Rptr. 855, 275 Cal.App.2d 345

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79 Cal.Rptr. 855

JUN 21 2010

275 Cal.App.2d 345

IDAHO BOARD
TAX APPEAL**Senator John L. HARMER, Senator Howard Way, Assemblywoman Pauline L. Davis and Senator William Coombs, Petitioners,**

v.

SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF SACRAMENTO, Respondent;**CALIFORNIA INDIAN EDUCATION ASSOCIATION, INC., Susanville Indian Rancheria General Council, American Indians of Santa Clara Valley, Inc., Soboba Band of Mission Indians of the Soboba Reservation, on behalf of themselves and all other Indian tribes and organizations in California, incorporated and unincorporated; Robert P. Lofton; Lorena L. Dixon; Edward Patrick Vedolla; and Clyde Stanley; on behalf on themselves and all other American Indians residing in California, Real Parties in Interest.****Civ. 12365.****California Court of Appeal, Third District****July 31, 1969.**

Hearing Denied Sept. 24, 1969.

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Thomas C. Lynch, Atty. Gen., by Joel E. Carey and Jan Stevens, Deputy Attys. Gen., Sacramento, for petitioners.

George F. Duke, California Indian Legal Services, Berkeley, for real parties in interest.

FRIEDMAN, Associate Justice.

Of the four petitioners, three are members of the State Senate and one a member of the Assembly. They seek a writ of prohibition to restrain the Sacramento Superior Court from proceeding against them in a civil lawsuit. They assert the immunity established by article IV, section 14, of the California Constitution: 'A member of the Legislature is not subject to civil process during a session of the Legislature or for 5 days before and after a session.'

The petitioner-legislators are members of the State Advisory

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Commission on Indian Affairs. Together with the commission itself, its executive secretary and its nonlegislative members, three of the petitioners were named as defendants in a class action brought in the Sacramento Superior Court on behalf of American Indians residing in California. The lawsuit asserted a violation of the laws requiring open meetings of state agencies (Gov.Code, §§ 11120--11130) and sought an injunction against alleged secret meetings.^[1] Summons and complaint in the action were served on these three petitioners on or about April 27, 1969, and a subpoena on the fourth on or about May 5, 1969. Additionally, a notice of deposition and subpoena duces tecum were served on petitioner Harmer

<http://www.lawriter.net/CaseView.aspx?scd=CA&DocId=30767&Index=%5c%5c192%2e1...> 6/19/2010

on June 18, 1969. The Legislature was in session during these dates and remains in session at this time.

Asserting their constitutional immunity, petitioners moved the superior court to quash the service of summons and the discovery proceedings. The superior court denied the motions. It ordered petitioner Harmer to submit himself to a deposition on August 7, 1969, and allowed him until August 1, 1969, to answer interrogatories. This proceeding was then instituted. The plaintiffs in the lawsuit appear here as real parties in interest. They have filed a general demurrer to the petition.

The State Advisory Commission on Indian Affairs is a statutory body consisting of the Director of Social Welfare, the Director of Public Health, the Director of Education, three members of the Senate and three members of the Assembly. (Gov.Code, §§ 8110--8112.) The chairman is designated by the Governor. (Gov.Code, § 8114.) According to current law, the commission is to go out of existence on October 1, 1969. (Gov.Code, § 8118.) Essentially, the commission's function is to study the problems of Indians in California and to report its findings and recommendations to the Governor and the Legislature. (Gov.Code, §§ 8116, 8117.) [2]

Where, as here, a claim of legislative immunity has been made in the trial court and denied, prohibition is a

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TAX APPEALS

proper remedy. (Allen v. Superior Court, 171 Cal.App.2d 444, 448.) Real parties in interest argue that petitioners 'waived' their immunity by accepting membership on the State Advisory Commission on Indian Affairs. The argument rests on two assumptions: first, that the exemption in article IV, section 14, is confined to process in those civil actions involving legislative functions; second, that advisory commission membership places the legislator-members in a nonlegislative role or character. Both assumptions are erroneous.

In precise terms article IV, section 14, creates an exemption from civil process without qualification as to the kind or subject matter of the lawsuit. Similar exemptions have been construed to cover civil actions of all kinds, including those involving the legislator's personal affairs. (See Long v. Ansell, 293 U.S. 76, 55 S.Ct. 21, 79 L.Ed. 208; Fuller v. Barton, 234 Mich. 540, 208 N.W. 696; Note, 94 A.L.R. 1470, 1479--1480.) While conveying incidental personal advantage, such immunities are designed to benefit the public by protecting legislators against compelled distraction and interference during the session. (See Tenney v. Brandhove, 341 U.S. 367, 373--374, 377, 71 S.Ct. 783, 95 L.Ed. 1019.) The California immunity applies to civil process generally and cannot be squeezed by interpretation to a restricted class of lawsuits. (Cf. Allen v. Superior Court, supra, 171 Cal.App.2d 444; Hancock v. Burns, 158 Cal.App.2d 785.)

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The second assumption is equally fallacious. As members of the advisory commission, petitioners have not doffed their legislative character and immunity. A study agency of similar composition and function is the California Commission on Interstate Co-operation. (Gov.Code, §§ 8000--8013.) In 1941 the California Supreme Court held that legislative members of the latter commission were not in violation of the constitutional provision (now found in article IV, section 13) which prohibits a legislator from holding a nonlegislative office or trust. The court declared: 'Where a statute merely makes available new machinery and new methods by which particular legislators may keep themselves informed upon specific problems, it cannot be said to have imposed upon them any new office or trust. The additional duties which rest upon the legislative members of the commission are identical in purpose and kind with those which they already perform. As was said in People v. Tremaine, 252 N.Y. 27, 41, 168 N.E. 817, 821, 'The duties of members of the Legislature may be enlarged without making a civil appointment or creating a new office, so long as the duties are such as may be properly attached to the legislative office * * *.' We hold, therefore, that the statute here attacked did not contemplate the conferring of any new office, trust, or employment upon the legislative members of this commission.' (Parker v. Riley, 18 Cal.2d 83, 88, 876, 134 A.L.R. 1405.)

In terms of retention of legislative status, there is no meaningful distinction between Parker v. Riley and the present case. Both commissions are hybrid groups, composed in part of officials of the executive branch and in part of legislators. Both possess a mission and function which are essentially advisory. Both are devoid of administrative functions other than those which forward its prime advisory mission. In neither case do the commission's legislator-members assume a nonlegislative character when engaged in commission activities.

Laws creating an immunity from judicial process, however temporary, inevitably trench upon the judicial function,

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hence may encounter constitutional objections. (See *Thurmond v. Superior Court*, 66 Cal.2d 836, 839--840, 59 Cal.Rptr. 273; *Granai v. Witters, Longmoore, Akley & Brown* (1963) 123 Vt. 468, 194 A.2d 391.) Because we deal with an immunity created by the State Constitution, real parties in interest give the objection a federal coloration by equating access to the courts with the 'due process' concept.

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By analogy to the *Thurmond* case, *supra*, they urge that article IV, section 14, can be sustained only by making its application discretionary.

There are conceivable situations where an immunity of this sort might amount to a denial of due process. This is not one of them. The plaintiffs in the superior court are seeking enforcement of a right conferred by state law to demand open meetings of state boards. (Gov.Code, § 11130, fn. 1, *supra*.) In their lawsuit the commission itself is the only indispensable party; the individual members are proper but not necessary parties. (*Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 314--315.) Although, in view of the October 1, 1969 demise of the commission, their inability to serve effective process on the legislator-members occurs during a critical period, it does not bar them from relief.

Moreover, the immunity does not expose private citizens to abuse of governmental power untrammelled by judicial restraint. The commission is advisory only. Although it includes three members of the executive branch, its function is analogous to that of a legislative investigating committee. It does not 'govern' in the sense that it executes and administers the laws. It has no power to impinge upon the lives, liberty or property of private citizens. The positions here created do not measure up to so high a standard. They involve merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the legislature. Such tasks do not require the exercise of a part of the sovereign power of the state.' (*Parker v. Riley*, *supra*, 18 Cal.2d at p. 87, 113 P.2d at p. 876.) A statutory scheme clothing legislators with executive-administrative functions would run afoul of the separation of powers principle and of the prohibition against legislators holding nonlegislative office. (Cal.Const. art. III; art. IV, § 13; *Parker v. Riley*, *supra*, 18 Cal.2d at p. 88; *Springer v. Government of Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845; *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817, 822.) Thus the specter of legislators wielding executive power while armored in immunity from civil process arouses no constitutional tremors.

Let the writ issue as prayed.

PIERCE, P.J., and REGAN, J., concur.

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NOTES:

[1] Government Code, section 11130: 'Any interested person may commence an action either by mandamus or injunction for the purpose of stopping or preventing violations or threatened violations of this article by members of the state agency.'

[2] Government Code, section 8116: 'The commission shall study the problems of the American Indians residing in California, including, but not limited to, the problems presented by the termination of federal control over Indian affairs, the operation, effect, administration, enforcement, and needed revision of any and all state laws pertaining to the Indians and the three relocation centers in California and shall report its findings, together with any suggested legislation, to the Governor and to the Legislature not later than the 15th day of June, 1962.'

Government Code, section 8117: 'The commission has the following additional powers and duties:

(a) To contract with such other agencies, public or private, as it deems necessary for the rendition and affording of such services, facilities, studies, and reports to the commission as will best assist it to carry out the purposes for which it is created.

(b) To co operate with and secure the co-operation of county, city, city and county, and other local agencies in investigating any matter within the scope of this chapter.

(c) To report its findings and recommendations to the Governor, the Legislature, and to the people from time to time and at any time, not later than provided in Section 8115.

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'(d) To do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this chapter.

'(e) To appoint an advisory committee consisting of not more than seven members, three of whom shall be appointed from among the recognized leaders of the California Indian reservations in the northern, central and southern sections of the State, and four of whom shall be appointed from the public at large. Section 11009 of the Government Code is applicable to the advisory committee.'

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Legislative Sec. 14.

California Constitution

Article IV. LEGISLATIVE

Current through 2008 election

Sec. 14.

A member of the Legislature is not subject to civil process during a session of the Legislature or for 5 days before and after a session.

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BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,)	
)	
Appellant,)	APPEAL NO. 10-B-1289
)	
-vs-	)	TAX COMMISSION'S REPLY TO
	)	APPELLANT'S MEMORANDUM IN
IDAHO STATE TAX COMMISSION,	)	OPPOSITION TO MOTION TO DISMISS
)	
Respondent.)	
)	

I.

THE BOARD OF TAX APPEALS LACKS JURISDICTION BECAUSE OF APPELLANT'S FAILURE TO FILE AND PERFECT A TIMELY APPEAL

A. Appellant has failed to meet the jurisdictional requirements of Idaho Code section 63-3049 and tax commission rule 600.

Idaho Code section 63-3049 governs the review of Tax Commission decisions by the courts and by the Board of Tax Appeals. As noted in the Tax Commission's Memorandum in Support of Motion to Dismiss, the requirements of Idaho Code section 63-3049 are jurisdictional and the failure to comply with Idaho Code section 63-3049 denies this board jurisdiction over the case. See Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 P.2d 313 (1999). It is worth noting that the Supreme Court in Ag Air noted that the district court had no authority to modify the statutory requirements of Idaho Code section 63-3049. The same reasoning would

apply to this board in reviewing this case and would deny this board the authority to modify the requirements of Idaho Code section 63-3049.

Idaho Code section 63-3049 is clear on its face that a taxpayer has 91 days after receipt of the notice of decision to file an appeal either with this board or with the district court. By his own admission, the taxpayer did not do so in this case. The code section is also clear that before a taxpayer may seek review by the district court or by the Board of Tax Appeals, the taxpayer shall secure payment of the tax by depositing cash with the Tax Commission in an amount equal to 20 percent of the amount asserted. By his own admission, the taxpayer did not do this within the prescribed time limits. The taxpayer apparently believes that this security requirement can be met simply by making another promise to provide security at some date later than that required by statute. This "stacking of promises" does not meet the requirements of the statute nor does it meet the definition for security.

The taxpayer cites a sentence in Idaho Code section 63-3049(b), which allows the taxpayer to provide any other type of security acceptable to the Tax Commission. It is the taxpayer's argument that, since the Tax Commission did not object to his subsequent promise to secure the original promise, the Tax Commission acquiesced and has allowed a type of security (a second promise) other than a cash deposit.

The taxpayer's argument flies in the face of common sense and the language of the statute. It is also in violation of Tax Commission Rule 600. That rule outlines what constitutes acceptable security under Idaho Code section 63-3049(b). A copy of Rule 600 has been attached to this Memorandum as Exhibit A for the convenience of the board. In summary, Rule 600 states that acceptable security is: a) cash; b) a bond executed by a security company licensed and authorized to do business in Idaho; c) bearer bonds; d) automatically renewable time certificates

of deposit; e) investments certificates or share accounts, or; (f) irrevocable letters of credit. Rule 600 also provides that other security may be accepted by the Tax Commission, but only in cases where the Tax Commission “has previously agreed in writing to accept other security in lieu of cash payment.”

The Tax Commission never agreed to accept other forms of security from this taxpayer nor did it agree to waive the time for filing and perfecting an appeal. It is doubtful that the Tax Commission could even waive the time for filing and perfecting an appeal and one questions whether a taxpayer’s subsequent promise to satisfy the security requirements of Idaho Code section 63-3049(b) could be accepted by the Tax Commission. In any event, there is no previous agreement, in writing, to accept security in lieu of cash payment as required by Tax Commission Rule 600.

It is worth noting the Tax Commission Rule 600 was duly promulgated in accordance with the Idaho Administrative Procedures Act. As such, these rules were reviewed by the Idaho Legislature.

B. Appellant’s status as a legislator does not excuse him from the requirement to file a timely appeal.

The Appellant seems to be arguing that his status as a legislator excuses him from the requirement to file a timely appeal. The Appellant argues that under Art. III, sec. 7, legislators are excused from the statutes of limitations, such as the one contained in Idaho Code section 63-3049, and therefore do not have to file timely appeals to tax cases. Such reasoning would presumably also apply to a variety of civil cases. It appears the taxpayer’s argument that the statute of limitations is tolled during the time that the legislator is serving in session and for ten days prior to the commencement of the session. As noted in the Tax Commission’s initial Memorandum and Support of Motion to Dismiss, this is not a correct reading of the statute or a

correct interpretation of the terms “civil process.” The Tax Commission cited Webster’s Dictionary as well as an Arizona case, both of which shed some light on how the phrase “civil process” is to be interpreted.

Attached hereto as Exhibit B are three pages from Webster’s Third New International Dictionary, copyright 2002. Attached hereto as Exhibit C are three pages taken from the copyright 1966 version of the New International Dictionary. These dictionaries appear consistent with the purpose of the immunity from arrest provisions found in many state constitutions, including Idaho’s, and also appear consistent with rationale of court cases including Smith v. Arizona Citizens Clean Elections Commission, 132 P.3d 1187 (Ariz., 2006) and the history and rationale cited in State v. Beno, 341 NW 2d 668 (Wis. 1984).

II.

IDAHO CODE SECTION 63-3002 ADOPTS ONLY THOSE PROVISIONS OF THE FEDERAL INTERNAL REVENUE CODE WHICH RELATE TO THE MEASUREMENT OF TAXABLE INCOME.

Apparently, it is the Appellant’s argument that the procedures to be followed in this case are not those adopted by the Idaho Legislature, but rather they are those mandated by the Federal Internal Revenue Code. On page two of his brief, the Appellant states:

On January 2, 2009, US Code section 7491 was adopted. It changed the ultimate burden of proof in tax appeals from the taxpayer to the revenue service. Idaho Code section 63-3002 makes Idaho Act identical to the provisions of the federal act. Idaho Code section 63-3004 adopted the federal code as it was in effect in February 17, 2009.

Idaho Code section 63-3004 is part of a series of code sections within the Idaho Income Tax Act which provide definitions. These code sections are found in Idaho Code

sections 63-3003 through 63-3018. The other code section cited by the Appellant is Idaho Code section 63-3002. That code section reads in relevant part:

It is the intent of the legislature by the adoption of this act insofar as possible to make the provisions of the Idaho act identical to the provisions of the federal internal revenue code relating to the measurement of taxable income.... (Emphasis added.)

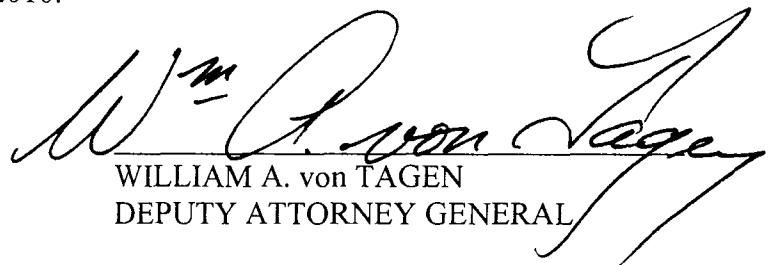
Idaho Code section 63-3002 was never intended to be a wholesale repeal of Idaho tax statutes and statutes which set forth the procedures to be followed in appeals of tax cases, as Appellant argues.

III.

CONCLUSION

Neither the Board of Tax Appeals nor the Idaho State Tax Commission nor even a district court have jurisdiction over this matter. The Appellant has failed to comply with the provisions of Idaho Code section 63-3049 and Rule 600 by failing to timely file and perfect his appeal. His status as a legislator does not operate to toll statutes of limitation whether they are contained in the Idaho Income Tax Act or other provisions of Idaho law. Without jurisdiction, this board must dismiss the taxpayer's appeal.

DATED this 26th day of May 2010.


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

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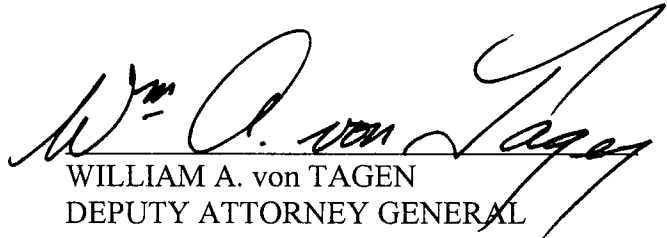
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DEPUTY ATTORNEY GENERAL

600. JUDICIAL REVIEW -- REQUIRED SECURITY (RULE 600).

Section 63-3049(b), Idaho Code.

(3-20-97)

01. Acceptable Security. For purposes of obtaining judicial review, the taxpayer must submit one (1) of the following securities: (3-20-97)

a. Cash in the form of a cashier's check, money order, or other certified funds that are payable to the Tax Commission. (3-20-97)

b. A bond executed by a surety company licensed and authorized to do business in Idaho, conditioned on the payment of any tax, penalty, and interest that may be found due by the court. (3-20-97)

c. Bearer bonds or other similar obligations of the United States having a market value not less than twenty percent (20%) of the amount asserted. (4-11-06)

d. Automatically renewable time certificates of deposit, not exceeding the federally insured amount, issued by a bank doing business in Idaho and insured by the Federal Deposit Insurance Corporation. They must be made in the name of the depositor, payable to the Tax Commission, and contain a provision that interest earned shall be payable to the depositor. (3-20-97)

e. Investment certificates or share accounts, not exceeding the federally insured amount, issued by a savings and loan association doing business in Idaho and insured by the Federal Savings and Loan Insurance Corporation. Evidence of the insured account, either certificate or passbook, must be delivered to the Tax Commission, along with a properly executed assignment form whereby the funds on deposit are assigned and made payable to the Tax Commission. (3-20-97)

f. Irrevocable letters of credit not exceeding the federally insured amount, issued by a bank doing business in Idaho and insured by the Federal Deposit Insurance Corporation, made to the benefit of the Tax Commission. The terms of the letter of credit must permit the Tax Commission to make demand directly against the issuer of the letter of credit for not less than twenty percent (20%) of the amount asserted, on which the taxpayer's rights to appeal have expired, and for which the letter of credit was submitted to secure. (4-11-06)

02. Other Security. Other security may be accepted by the Tax Commission to secure a taxpayer's right of appeal if the Tax Commission has previously agreed in writing to accept the other security in lieu of a cash payment. (3-20-97)

03. Amount Asserted. For purposes of this rule, amount asserted is defined in Section 63-3049, Idaho Code. (4-11-06)

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civil *v.* **1** : seemly in aspect : compatible with human sensibility
2 : PRESENTABLE, SHIPSHAPE **6** *dial.* of weather : not inclement **7** FAVORABLE **7** of time : based on the mean sun legally recognized for use by the general public in ordi affairs ~ distinguished from *sideral* (<the ~ calendar, ~ day begins at mean midnight) **8** a : belonging or relating to the general public, the pursuits, experiences, ways, and interests of the citizenry, or to civic or temporal affairs as distinguished from military, ecclesiastical, or like legal spheres membership in affairs CIVILIAN (new educational techniques learned in the war just ended, should be put into ~ —Henry Wallace) (the old conflict between the ~ and the sacerdotal powers —Edward Clodd) b : representing or serving the general public in the sphere of political rule or administration; esp. : belonging to or sanctioned by an executive department of a nation, state, or municipality (officials of a ~ board) (prohibiting a member of Congress from being appointed to any ~ office) (rates and hours set by ~ regulations) **9** obs. : virtuous by nature but not regenerate : moral as distinguished from religious (<righteousness)
syn. **10** COURTEOUSLY, COURTLY, GALLANT, CHIVALROUS:
now implies adequate consideration of others and forbearance from rudeness or unpleasantness (remember, they had to be civil . . . is the only way to be beloved and well received in company, that to be ill-bred . . . is intolerable —Earl of Chesterfield) (I mean to return his visit tomorrow. It will be only civil in return for his politeness, to ask to see him —Sheridan Le Fanu) POLITE may imply cold, formal, perfunctory deference to etiquette (let's be polite, but act as though she didn't exist —Sherwood Anderson) Often it differs from CIVIL in suggesting warmer or more sincere consideration of others (the bishop seldom questioned Jaxinto in his thoughts or beliefs. He didn't think it polite —Willia Cather) (under ordinary circumstances he would have tried to be polite. As it was, he could hardly bring himself to give them a civil word of welcome —Norman Douglas) COURTEOUS may suggest a certain polish and delicacy of action; it may connote either mere formal deference, however perfect, to custom, or a genuine sincere consideration and regard (the baronet peeped at his grandson with the courteous indifference of one who merely wishes to compliment that mother of anybody's child —George Meredith) CIVIL owns a fine old historical painting —Chateaudon, and he was courteous enough to permit me to view it —Upton Sinclair) COURTLY suggests the stately or ceremonious (Pitt Crawley treated her to a profound courtly bow, such as he had used to H. H. the Duchess of Pumphernickel, when he was attaché at that court —W.M. Thackeray) GALLANT and CHIVALROUS, in this sense, indicate esp. courtesy and attention to women, the former often suggesting either the spirited and dashing or the elaborate and over-attentive (the qualities . . . of surface chivalry and gallant attentiveness in her brilliant American friend had for a moment seemed to reveal to last night in me —Havelock Ellis) CURVULOUS in this sense often connotes half-mindedness and disinterested attention (ladies were supposed to be without sexual desire . . . gracious beings they were, without a sordid thought, according to the chivalrous notions of the time —W.E.Woodward) (she had fainted from weakness, and he had felt strangely chivalrous and paternal —Ellen Glasgow)

civil affairs *n pl* : affairs and operations of the civil population of a territory that are supervised and directed by a friendly occupying power

civil airway *n* : an airway designated by the national civil aviation authority as suitable for interstate or foreign air commerce

civil architecture *n* : ARCHITECTURE **1**

civil authority clause *n* : a clause in fire and similar insurance policies excluding loss caused by order of civil authorities unless destruction is for the purpose of checking the progress of the hazard insured against

civil bond *n*, **Brit** : a security issued by a sovereign or quasi-sovereign state and usu. not secured by collateral

civil contempt *n* : willful disobedience to a lawful order or decree entered as a civil remedy for the benefit of a party to a lawsuit

civil corporation *n* : a corporation organized for business purposes — contrasted with *eleemosynary corporation*

civil day *n* : a day adopted for time reckoning in civil affairs; usu. : the mean solar day of 24 hours beginning at mean midnight

civil death *n* : a change of status of a person equivalent in its legal consequences to natural death ; deprivation of rights and privileges as a citizen or a member of society

civil defense *n* : protective measures and emergency relief activities undertaken by civilians under the authority for minimizing civilian casualties and property damage for maintaining vital facilities and services in case of enemy attack, sabotage, or other hostile action (as an air raid)

civil disobedience *n* : refusal to obey the demands or commands of the government esp. as a nonviolent collective means of forcing concessions from the government — see NONCOMPLIANCE

civil district *n* : a district formed for administrative purposes; specif. : minor political division of a county in certain states

civil embargo *n* : a government's embargo on the movement of ships under its own flag or on merchant marine vessels

civil engineer *n* : an engineer whose training or occupation is in civil engineering —abbr. **C.E.**

civil engineering *n* : a branch of engineering concerned primarily with public works (as land surveying, the building of highways, bridges, waterways, or harbors, or the provision of artificial water supply, sewage disposal, irrigation) but also embracing private enterprises (as railroad and airport building, private building construction, farm drainage)

ci-vil-liz-a-tion \sī'vilyən\ *n* -s [ME, fr. *civile* civil law (fr. L, short for *iuris civilis*) + *-lan*] **1** a : one who practices or has made a special study of civil law **b** : the Roman law system as distinguished from the canon law and the English common law **b** : one esp. skilled in or devoted to the law affecting civil rights and remedies **2** : an employee in the former imperial civil service of India **3** a : a resident of a country who is not an active duty in one of the armed services **b** : a resident or not an active member of a police or fire-fighting force organized with ranks like military ranks **4** **civilians** *pl* : CIVILIANS

civilian \ˈsɪvəlɪən\ *adj* **1** a : made up of civilians (the ~ population) **b** : belonging to or deriving from the aggregate body of civilians (<customers) (<rights) (<recruits) (<relations) (<habits) (<mind) **c** : having the status of a civilian **4** (~ pilot) **2** a : operated or controlled by civilians (<industry) : possessed by or vested in civilians (<authority) **b** : undergone or sustained by civilians (<sacrifices) **3** a : intended or allotted for use or consumption by civilians (<goods) **b** : suitable for civilians

civil-i-an-ism \sī'vīzəm\ *n* -s : dominance of civilian interests and their implementation over military force

civilization \sī'vīləzə'shun\ *n* -zēshən, -nī-zā-sən : the action of civilizing

civilize \sī'vīləz\ *v* -nīz\ vt -əd/-ING/-s *see* -ize in Explain

civilize *v* : to convert from military to civilian status or control

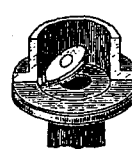
civil imprisonment *n* : imprisonment by civil process

civil-law *n* **Brit var** of CIVILIZE

civil-lawyer \sī'vīləstər\ *n* -s [ML civillista, fr. L *civile* civil law + *-ista* -er]

service of the forms of accepted social behavior or adequate perfunctory politeness **b obs**: decent behavior or treatment
PROPRIETY **c**: an act or expression conforming to conventional patterns of social behavior (eager to escape the civility [the occasion])
civ-il-liz-a-ble ['siva,lizəbəl] *adj* [**F** *civilisable*, fr. *civiliser* to civilize + *-able*]: capable of being civilized
civ-il-liz-a-tion or **civ-il-li-sa-tion** ['sivə'lzə'sheɪn, sivo'li-'zeiʃən, bri'tiʃ & US sometimes 'fɜːv-i-l-iz-ə-ti-ən] *n* [**C** *civilization*, fr. *civilisatio* = *L* *civilitas* 'city' + *-ation*] **1**: the stage of development at which writing and the keeping of written records is attained; **also** **2**: the stage marked by urbanization, advanced technique (as of agriculture and industry), expanded population, and complex social organization (modern ~ with its helpless dependence on technology) **3**: the process of becoming civilized: progressive development of arts, sciences, statescraft, and human aspirations and spirituality (~ is a slow process marked by many failures and setbacks) **4**: the act of civilizing; esp.: the forcing of a particular cultural pattern or position on which is founded much of the power of the strength was wasted on the bloody ~ of unwilling peoples) **5**: the whole of the advances of human culture and aspiration beyond the purely animal level (~ is the descriptive inventory of all the modifications brought about in ... the normal life of man in society — Pierre LeComte du Nôly) (the first man to chip a stone into a better tool took a great step forward in ~) **6**: conformity to conventional patterns of behavior or expression: refinement of thought, manners, or taste **7 a**: the parts of the earth characterized by a relatively high level of economic and technological development (made his way across the land of two distant tribes to reach ~) **b**: situation of urban comfort: city life (we enjoy our country weekends but it's good to get back to ~ and hot running water)
civ-il-liz-a-tion-al ['siv-,l-iz-ə'sheɪn-, -shənl] *adj*: dealing with or relating to civilization — **civ-il-liz-a-tion-al-ly** [-shənl'i- -shənl-i] *adv*
civ-il-liz-a-to-ry ['siv-,l-iz-ə'reɪ] *adj* [*civilization* + *-ory*]: tending to advance civilization: CIVILIZING
civ-il-liz-e ['siva,liz] *Brit often & US* *civilises*, fr. *vital* + *-ize/-ing* - see *-ize* in *Explan Notes* [**F** *civiliser*, fr. *civil-* + *-iser*] **vt**: to bring up to the standards of civilization (as a people) to develop out of a primitive state through establishment of a system of social custom and political organization: instruct in the rules and standards of a civil order **b**: to bring (a people) to a technically advanced and rationally ordered stage of development of knowledge, polity, and international relations **2**: to raise up to a rationally and aesthetically refined and humanely oriented level of adjustment to the collective relations of mankind: **a**: to instruct in the sophisticated attitudes, polished elegance, and polite observances of elite society and good breeding train in urbanity **b**: to educate or influence line with the standards of self-control, uprightness, and impartial consideration of common needs and aspirations of humankind that are essential to social harmony and security of human freedoms: SOCIALIZE **2 c**: to bring to recognition of or to accord with cultivated and refined aesthetic standards of classic literature and the fine arts **3 obs**: to bring under civil authority **4 obs**: to declare or treat as socially permissible or acceptable ~ vi **1**: to acquire the customs and amenities of a civil community **2 dial**: to array or tidy oneself according to the standards of cleanliness acceptable in a community
civilized ['siv-laɪzd] *adj*: having a culture: characterized by progress esp. in statecraft and in the arts and sciences (the essential characteristic of a highly ~ society is ... that it is appreciative — Clive Bell) **2**: of or relating to peoples or nations in a state of civilization (must not be supposed that there is any essential stability in a way of life — Bertrand Russell) **3 a**: characterized by politeness, refinement, or good breeding (had become a ~ chivalrous Christian knight — Charles Kingsley) **b**: characterized by sophistication or urbanity (he is humorous, ironic, and penetrating in a dispassionate way — Marvin Lowenthal) — **civ-il-ized-ness** ['siv-laɪzdnəs] *n* **c**
civ-il-liz-es ['siv-,l-iz-z] *n* -s: a civilized person
civ-il-liz-er ['siv-,l-iz-(r)] *n* -s: one that civilizes
civil law *n*, sometimes *cap C&L* [**ME** *lawe civile*, trans. of *L jus civile*] **1 Roman law** **a**: the local law of a state or of Rome — distinguished from *jus gentium* and *jus naturae* **b**: the strict law as distinguished from the praetorian law established by edicts **2**: Roman law as applied in the middle ages and set forth chiefly in the Justinian Code **3 a**: the body of private law that has developed from the Roman law in the states descended from one or more substantially Romano but has been influenced by Germanic, ecclesiastical, and pure modern institutions — compare COMMON LAW **b**: the law of private rights — distinguished from criminal law; compare CIVIL **5b**
civil libertarian *n*: one who upholds the principles of civil liberty; esp.: one who defends civil liberties against invasion
civil liberty *n*: freedom from arbitrary governmental interference (as with the right of free speech) specif. by denial of governmental power and in the U.S. esp. as guaranteed by the Bill of Rights — usu. used in pl.
civil list *n*: a list of persons with titles
civil list *n*: a list of sums appropriated by a civil government (as judges, ambassadors, secretaries) and civil servants — obs. in U.S. **2**: a list of sums appropriated by a parliament to pay expenses of the sovereign and his household
civ-il-ly ['siv(ə'l-i-, -iv-, -i)] *adv* **1**: with just ordinary courtesies and perfunctory politeness **2 a**: in connection with civil rights and liabilities or civil affairs **b**: in civil relations (a ~ united Europe) **3**: in accordance with civil law or obligation
civilly dead *adj*: dead in the eyes of the law
civil marriage *n*: a marriage solemnized before a civil magistrate instead of by a priest or clergyman
civil process *n*: writ or order of court in a civil action; esp.: a writ for arrest in a civil proceeding
civil rights *n pl*: those rights the enjoyment of which does not involve participation in the establishment, support, or management of the government; *specif*: the rights secured to citizens of the U.S. by the 13th and 14th amendments to the constitution and certain acts passed by Congress April 9, 1866, May 31, 1870, and March 1, 1873, abolishing the civil incidents of involuntary servitude
civils *n pl*, obs.: civil affairs
civil servant *n*: a member of a civil service **2**: a member of the administrative staff of an international agency
civil service *n* **1 a**: the branch of the service of the East India Company conducted by covenanted servants not belonging to the army or navy **b**: the whole public administrative service of a government including all branches except military

civ- *ˈsɪvɪzəm* *n* [*Fr civisme*, fr. *L civis* citizen + *F*
 -ism] *n* — more at HOME; the virtues and sentiments of a
 citizen — used orig. of devotion to the cause of the
 revolution of 1789
 ci- *ˈkɛwɪzɪs* *n*, *pl* civi-*ˈtæs* *\kewɪzɪ, tæs* [*L*
 — more at CIVIL] a body of people constituting a politically
 organized community : STATE; esp : CITY-STATE
 civi- *ˈdæʃ* *n*, *usu* cap C&D [*LL* — more at CIVY OF
 -ity] *n* : CITY OF GOD
 civi- *ˈlaɪ* *adj* [*Fr civil*, *vi-ˈn*] *pl* civies *pl*, slang : civilian
 by shortening and alter. fr. *civilian* 1 *civies* *pl*, slang : civilian
 clothes as distinguished from military or naval uniform
 2 : CIVILIAN
 civvy street *n*, *Brit* : civilian life
 cixi- *ˈsɪksəd* *n* [*NL Cixidiæ*] : an insect of the family
 Cixiidae
 cixi- *ˈsɪks* [*sɪk*ˈsɪdæ, *dɛ*] *n*, *pl*, cap [*NL*, fr. *Cixius*, type genus (fr.
L *ḡkixios* cicada) + *-idae*] : a family of small elongated
 somewhat depressed insects (suborder Homoptera) related to
 cicadas
 CJ *abbr* chief judge; chief justice
 ck *abbr* 1 cake 2 cask 3 chalk 4 check 5 cook 6 countersink
 CKD *abbr* completely knocked down
 ckw *abbr* clockwise
 cl *abbr* 1 centimeter 2 claim; claiming 3 class; classification
 4 classical 5 clause 6 clearance 7 clergyman 8 clerk
 9 close; closure 10 cloth 11 clove 12 clutch 13 coil
 CL *abbr* 1 carload; carload lot 2 cash letter 3 center line
 4 civil law 5 common law 6 connecting line
 cl *abbr* chloro
 clab- *ˈbɛr* [*klab*(r) *sometimes* -lɪb-] *also* clabbered milk
 or clabber milk *n* *s* [short for *bony clabber*] *n*ow chiefly dial
 : sour milk that has thickened or curdled
 2 clabber *v* [*vb* clabbered; clabbered; clabbering -b(ə)rɪŋ]
 clabbers chiefly Midland : CURDLE, LOPPER
 3 clab- *ˈbɛr* [*klab*(r), -lɪb-, -lɪb-] *n* 1 [*ScGael* & *IrGael*
clábar] dial *Brit* : MUD, MIRE
 4 clab- *ˈbɛr* [*klab*(r), -lɪb-] *n* *s* [by shortening & alter. fr. *kla-*
berjass] : klaberjass or a similar card game derived from it
 clabber cheese *n* [*clabber* dial] : COTTAGE CHEESE
 claa- *ˈn* [*klag*ˈn] *n* [*ME*, fr. *ScGael*, hamlet, stepping-
 stones, *claa* fr. *clach* stone; akin to *Old* *clach* stone] *Scot* &
Irish HAMLET
 clack *ˈt* [*kl*ˈt] *vb* -ED/-ING-*s* [*ME clacken*, of imit. origin]
vi 1 : to utter words or sounds rapidly and continually :
 the tongue run on : CHATTER (just get her started and she'll
 ~ all day —J.C.Lincoln) 2 : to make a sharp abrupt noise
 (the whiplash ~ed, the jog-trot sharpened —Edmund Blunden)
 or succession of such noises (teletypes ~ed in all police sta-
 tions —Time) : CLATTER (she ~ed up the aisle and entered a
 front pew —Bruce Marshall) 3 of fowl : CACKLE, CLUCK
 (hen voices ~ing —Edith Sitwell) ~ *vi* 1 : to make to make a
 crack noise (the clacking of the grasshoppers ... ~ing their
 delicate wings —William Goyen) 2 : to produce with a
 cracking or clapping sound; *specif* : BLAB, BABBLE (all sorts of
 rumors were ~ed about)
 2 clack *ˈt* *n* [*s* [*ME clakke*, fr. *clacken*, *v*] 1 : loud confused
 noise (as of many voices) : loud continual, importunate, or
 foolish talk : CHATTER, PRATTLE (nothing but a farrago of the
 ~ of nurses —Laurence Sterne) 2 *archaic* : an object
 (as a rattle or clack valve) that produces clapping or cracking
 noises *us*. In regular rapid sequence 3 : a sharp abrupt noise
 or succession of such noises often produced by the striking
 together of objects (the clacking of plates and cups —Elizabeth M.
 Roberts) 4 : a gossiping tongue (her ~ was going all day
 —Mark Twain) or its possessor (that old ~)
 clack-a-mas or clak-a-mas *\kl*ˈkə-məs, *n*, *pl* clackamas or
 clakamas *usu* cap [modif. of Clackamas *Guthlakamas*]
 1 *a* : an Indian people of the Clackamas river valley of north-
 western Oregon 2 *a* : member of such people 2 : a dialect
 of Upper Chinook
 clack-dish *\kl*ˈkɒ-dɪʃ, *n* [*s* so called fr. the sound made by the
 lid] : CLASH-DISH
 clack-er *\kl*ˈkə(r) *n* *s* 1 : one that clacks : *a* dial *Brit* :
 a gossiping tongue 2 *a* dial *Brit* : a rattle or frighten away birds
 clack-et *\kl*ˈkæt *vb* [*MF claqueur*, fr. *claque* clapper of a
 mill, fr. *claque* slap, clatter, of imit. origin] *dial* : CLACK
 clack goose *\kl*ˈk- *var* of CLACK GOOSE
 clack-man-nan-shire *\kl*ˈkɒk, mən,ʃɪ(r) *cl*ak-, -shan-
 or clack-man-nan *\kl*ˈkɒk, mən,ʃɪ(r) *usu* cap [fr. *Clackmannanshire*
 or *Clackmannan* county, Scotland] : of or from the county of
 Clackmannan, Scotland : of the kind or style prevalent in
 Clackmannan
 clack valve *n* : a valve *usu*, hinged at one edge that permits
 flow of fluid in one direction only and that closes with a clacking sound — called
 also *clapper valve*
 cla-co *\kl*ˈkɒ *n* [*sp* *claco*] *n* [*s* [*MexSp*, alter. of
Sp *tlaco*] : TLACO
 clac-to-mi-an *\kl*ˈkɒk, tō-mi-ən, -nyən
adj, *usu* cap [*Clacton-on-Sea*, England,
 where the flaking tools were first found
 + *E* -ian] : of or relating to a lower
 Paleolithic culture of England character-
 ized by a peculiar method of flaking stone
 that rested in flakes having a half cone
 at the point where the hammerstone
 struck
 clad *ˈkl*ad, -aa(ə)d] [*ME clad*, *cladde*, fr. *OE clāðthe*, past
 of *clāthan* to clothe, fr. *clāth* garment, cloth — more at
 CLOTH] past of CLOTHE
 2 clad *ˈkl*ad *adj* [*ME cladde*, fr. *OE gecclāðed*, past part. of *clāthan*
 to clothe] 1 *a* : CLOTHED (well-clad children) 2 : DECKED,
 ADORNED (ivy-clad buildings) 2 *a* : SHEATHED, COVERED (an
 armor-clad car) *b* of *a* metal : overlaid on one or both sides
 with metal coating of a different composition to promote
 electrical conductivity or corrosion resistance or to impart
 other special properties (copper-clad steel) (*metal*)
 3 clad *ˈkl*ad *vi* clad; clad; cladding; clads [*ME claden*, fr.
cladd, *adj*] 1 : CLOTHE (cladding himself with the ornaments
 belonging to his degree —Edward Dacres) 2 : SHEATHE,
 FACE (the long wall ... ~ in vertical boarding of walnut
 —Michael Rosenauer); *specif* : to cover (a metal) with another
 metal by bonding
 clad- or clado- *comb* form [*NL*, fr. *Gk klad-, klado-*, fr.
klados — more at GLADIATOR] : slip : sprout (cladanthous)
 (cladophyll)
 clad-thous *\kl*ˈdæn(t)θəs *adj* [*clad* + -anthous]
 PLEUROCARPUS
 clad-an-toi-cous *\kl*ˈdæn,tōɪ-kəs, -a-dōɪ- *adj* [*clad* + *antoi-*
cous] : of mosses : having the male sexual organ on a special
 branch
 clad-ding *\kl*ˈdɪŋ, -aad-, -ɪŋ *n* [*s* fr. gerund of *clad*]
 : something that covers or overlays; *specif* : metal coating
 bonded to a metal core by heat and pressure or by casting
 — compare CLAD 2b
 clad-pl *\kl*ˈdɪd *n* : CLADUS
 cladis- *ˈtɪ* [*kl*ˈdɪs] *n*, *pl*, cap [*NL*, fr. *clad-* + -istia (fr.
clad-, *clad-*, of *cladon* *cladon*, cloth, sail, fr. *hístia* to make
 stand, wind) — more at STAP] : a order of Teleostomi
 comprising primitive bony freshwater African fishes that have
 scales, head skeleton, and pectoral arch which resemble those
 of the extinct Actinopteria and that include the bichir and the



clack valve
(open)

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MAY 24 2010

IDAHO BOARD OF
TAX APPEALS

Attorney for Appellant Mr. Hart

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,
Appellant

: APPEAL NO. 10-B-1289

vs.

: MOTION FOR EXTENSION OF
TIME TO RESPOND TO RESPONDENT'S
MOTION TO DISMISS PURSUANT
TO TAX APPEAL RULES 72 and 21

IDAHO STATE TAX COMMISSION
Respondent.

COMES NOW the Appellant, by and through his attorney of record, and pursuant to Tax Appeal Rule 72 and Rule 21 respectfully requests an extension of time to respond to the Motion to Dismiss filed by Respondent. This matter is not yet scheduled for hearing. As reflected by the file the undersigned counsel did not receive a copy of the Motion to Dismiss until May 4, 2010. During the interim counsel has been significantly involved in Kootenai County Case No. 10010, an Election Contest, and Kootenai County Case No. 09-8934 a Petition to set aside an unconstitutional long term debt or liability. In order to fully respond it is necessary for counsel to confer with Appellant Mr. Hart who is, unexpectedly to counsel, out of the area and unable to meet with counsel. That counsel has communicated with regard to this matter on two prior occasions to keep apprised of the situation. The issue raised by the Respondent's Motion to Dismiss involves a significant due process, statutory, and constitutional issue involving immunity of members of the Idaho State Legislature while the Legislature is in session. This issue is being considered by Idaho's Legislative leaders as this time and their input into this question is necessary. This motion is not made for the purpose of delay and is made in good faith in an attempt to permit the Board to fully and completely address this important issue upon full and complete briefing.

DATED this 21st day of May, 2010.

1 MOTION FOR EXTENSION OF TIME



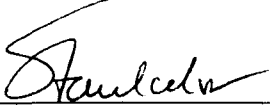
Starr Kelso, Attorney for Appellant Mr. Hart

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CLERK OF
THE SUPREME COURT

CERTIFICATE OF SERVICE: I certify that a copy was mailed, postage prepaid, to William A. von Tagen, Deputy Attorney General at P.O. Box 36, Boise, Idaho 83722 on May 21, 2010.



Starr Kelso

2 MOTION FOR EXTENSION OF TIME

Starr Kelso
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IDAHO BOARD OF
TAX APPEALS

Board of Tax Appeals
P.O. Box 83720
Boise, ID 83720-0088

83720/0003



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MAY 24 2010

IDAHO BOARD OF
TAX APPEALS

Attorney for Appellant Mr. Hart

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,
Appellant

: APPEAL NO. 10-B-1289

vs.

APPELLANT MR. HART'S
: MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS

IDAHO STATE TAX COMMISSION
Respondent.

_____:

COMES NOW Appellant Philip L. Hart (Mr. Hart), by and through his attorney, and files this Memorandum in Opposition to the Idaho State Tax Commission's (ISTC) Motion to Dismiss.

INTRODUCTION

This memorandum is being submitted following conversations with Board staff that represented that a brief filed before May 24th would be timely and despite the fact that a Motion for An Extension of Time was filed earlier today. If the Board grants the Motion for An Extension of Time the right to supplement this memorandum is reserved.

FACTS

Mr. Hart received a copy of the ISTC's decision on October 2, 2009. Because the 91 day time period to file an appeal with this Board would have run on a Saturday the appeal, absent other circumstances, would have been due by January 4, 2010. As a member of the 2010 Idaho State Legislature, Hr. Hart is not liable to any civil process during the session of the legislature, nor during the ten days next before the commencement there. Art. III, Section 7 Idaho Constitution. It is a matter of common knowledge that the Idaho Legislature convened on

January 11, 2010 and the preceding next ten days, because of a national holiday, is December 31, 2009. On December 31, 2009 Mr. Hart advised the ISTC of his appeal of its decisions. The number of days from December 31, 2009 through January 4, 2010 is four.

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MAY 24 2010

The Idaho Legislature adjourned on March 29, 2010. On March 30, 2010, the appeal time began to run again and the four days would extend through April 2, 2010. On March 30, 2010 Mr. Hart sent his Notice of Appeal that was lodged with the Board and received by the ISTC on March 31, 2010. The ISTC also received Mr. Hart's checks and the promise to pay.

The ISTC accepted the checks of Mr. Hart, his promise to pay, and his check in fulfillment of his promise to pay. In lieu of a cash deposit a taxpayer may deposit any other type of security acceptable to the tax commission. I. C. 63-3049 (b). The ISTC has never advised Mr. Hart that his promise to pay was not acceptable security. ISTC cashed Mr. Hart's check in fulfillment of his promise.

On January 5, 2009 U.S. Code section 7491 was adopted. It changed the ultimate burden of proof in tax appeals from the taxpayer to the revenue service. I.C. section 63-3002 makes Idaho act identical to the provisions of the federal act. I.C. section 63-3004 adopted the federal code as in effect on February 17, 2009.

ARGUMENT

The ISTC's argument claims lack of timeliness and failure to post bond. Each prong of the argument will be addressed below:

Mr. Hart Perfected His Appeal

(a) The appeal was timely filed.

Article III Section 7 of the Idaho Constitution specifically provides that any Idaho State Representative, such as Mr. Hart, "shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof..."

The question presented by Article III is what is "any civil process"? Respondent ISTC has chosen to ignore the adjective "any" and limited its argument to two a combination of two words that it chooses to combine as one word labeling it a noun. It has provided a cite to a copyrighted dictionary of 2002 vintage. Counsel for Appellant Mr. Hart has been unable to locate a copy of that dictionary and further has been unable to locate "civil process" by internet search. Indeed Blacks Law Dictionary, 1968, does not contain "civil process." The ISTC by eliminating "any"

2 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

and seeking to combine “civil process” into a noun suggests that it is a limited “word” that only refers to a “summons” or a “subpoena” or a “warrant.”

MAY 24 2010

Appellant Mr. Hart submits that the word “any” is critical to Article III Section 7 interpretation and further that the words “civil” and “process” are two distinct words with the word “civil” being an adjective and the word “process” being a noun. It is fundamental and universally accepted that statutes must be read to give effect to every word, clause and sentence. *Wright v. Willer*, 111 Idaho 474, 725 P. 2d 179 (1986)

There is no definition for a noun “civil process” as set forth in the 2010 Merriam-Webster on-line dictionary. The 2010 Merriam-Webster on-line dictionary treats the two words separately. Even if there is a one word noun, “civil procedure” it is beyond dispute that statutes are to be read and obeyed by the people according to their common usage among the great mass of the people who are expected to read and obey them. *City of Lewiston v. Mathewson*, 78 Idaho 374, 354, 303 P.2d 680, 684 (1965). Indeed the *City of Lewiston v. Mathewson* case addresses the construction of a statute that has the adjective “junk” with the noun “dealer.” It does not treat the words “junk dealer” as a one word noun. The Court carefully analyses the two words one by one to interpret the meaning of the statute. The respective definitions of the words “civil” as an adjective and “process” as a noun are as follows:

MLA Style

“civil.” Merriam-Webster Online Dictionary. 2010.
Merriam-Webster Online. 21 May 2010
<<http://www.merriam-webster.com/dictionary/civil>>

APA Style

civil. (2010). In *Merriam-Webster Online Dictionary*.
Retrieved May 21, 2010, from <http://www.merriam-webster.com/dictionary/civil>

CIVIL

Pronunciation: \ˈsi-vəl\

Function: *adjective*

Etymology: Middle English, from Middle French, from Latin *civilis*, from *civis*

Date: 14th century

1 a : of or relating to citizens **b** : of or relating to the state or its citizenry <civil strife>

2 a : **CIVILIZED** <civil society> **b** : adequate in courtesy and politeness : **MANNERLY** <a civil question>

3 a : of, relating to, or based on civil law **b** : relating to private rights and to remedies sought by action or suit distinct from criminal proceedings **c** : established by law

3 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

4 : of, relating to, or involving the general public, their activities, needs, or ways, or civic affairs as distinguished from special (as military or religious) affairs

1.

Main Entry: **pro·cess**

Pronunciation: \ˈprā-,ses, ˈprō-, -səs\

Function: *noun*

Inflected Form(s): *plural pro·cess·es* \-,se-səz, -sə-, -,sēz\

Etymology: Middle English *proces*, from Anglo-French *procés*, from Latin *processus*, from *procedere*

Date: 14th century

1 a : PROGRESS, ADVANCE <in the process of time> **b** : something going on :

PROCEEDING

3 a : the whole course of proceedings in a legal action **b** : the summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders

The word “any” which the ISTC wishes to ignore is far reaching. As reflected by the Merriam-Webster 2010 on-line edition it scope is all encompassing:

Main Entry: **any**

Pronunciation: \ˈe-nē\

Function: *adjective*

Etymology: Middle English, from Old English *ænig*; akin to Old High German *einag* any, Old English *ān* one — more at ONE

Date: before 12th century

1 : one or some indiscriminately of whatever kind: **a** : one or another taken at random <ask any man you meet> **b** : EVERY —used to indicate one selected without restriction <any child would know that>

2 : one, some, or all indiscriminately of whatever quantity: **a** : one or more —used to indicate an undetermined number or amount <have you any money> **b** : ALL —used to indicate a maximum or whole <needs any help he can get> **c** : a or some without reference to quantity or extent <grateful for any favor at all>

3 a : unmeasured or unlimited in amount, number, or extent <any quantity you desire> **b** : appreciably large or extended <could not endure it any length of time>

4 MEMORANDUM IN OPPPOSTION TO MOTION TO DISMISS

A common sense construction of Article III section 7, applicable the great mass of the people who are expected to read and understand it, is that it is applicable to "any" "matter relating to civil law" that is "relating to private rights" involving the "whole course of proceedings in a legal action" and that its application is "without restriction."

The ISTC's argument advanced by a deputy attorney general seeking to ignore "any" and interpret "civil process" as one word, a noun, and not as distinct words with common and understandable meanings is at best unsupportable. In this matter the deputy has taken an adversarial position that is unsupported by any formal Attorney General Opinion or case law. In challenging the operation of a specific Article of Idaho's Constitution, against a sitting member of the Idaho legislature, one would expect the deputy to take a more thorough and reasoned approach.

Also the argument advanced that Mr. Hart is "seeking to invoke the jurisdiction of this board and not defending himself from civil process" is similarly without merit. Mr. Hart without question is defending himself from the overreach of the Idaho State Tax Commission

(b). The deposit requirement was met.

Mr. Hart filed two checks totaling \$9,462.04 and his promise to pay the balance of the twenty percent, \$1,962.36. Mr. Hart's check for the balance was received and cashed by the ISTC. The affidavit of Shelly Sheridan submitted by the ISTC confirms these facts and the memorandum admits these facts. It is not disputed, nor is it even suggested, by ISTC that it, at any time or in any manner contacted Mr. Hart and informed him that his promise to pay was not "security acceptable to the tax commission." Idaho Code section 63-3049 (a). The ISTC by inaction waived any claim that the security was not acceptable to it and it is estopped to claim otherwise at this time. The ISCT is specifically granted by statute the discretion to accept "other type of security" in lieu of a cash deposit. Idaho Code section 63-3049. Whether estoppel exists against the government is tested generally by the same rules as those applicable to private persons. The government should not be permitted to utilize tactics that would not be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one. *Ware v. Idaho State Tax Commission*, 98 Idaho 477, 567 P. 2d 423 (1977). Equitable estoppel may be applied to prevent assertion of a statute of limitation if an actor's conduct caused the other party to refrain from some action

5 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

during the limitation period. *Johnson v. McPhee*, 147 Idaho 455, 210 P. 3d 563 (Id. App. 2009) The ISTC's failure to promptly, or at anytime prior to its present motion, advise Mr. Hart, upon receipt of the checks and the promise to pay on March 31, 2010, that it did accept his promise to pay coupled with its cashing of the payment shortly thereafter clearly prejudices Mr. Hart if its belated argument is accepted. *See Zumwalt v. Stephan et. al.* 113 Idaho 822, 748 P. 2d 406 (Id. App. 1987).

MAY 24 2010

(c) The twenty percent deposit requirement violates Mr. Hart's constitutional and due process rights.

The 14th Amendment Section 1 to the United States Constitution specifically provides that "no state shall make or enforce any law which...shall deprive any person of...property, without due process of law." Any citizens right to challenge a state's attempt to take his property, especially a "tax" is protected by the 14th Amendment. *See Harper v. Virginia Board of Elections*, 865 S. Ct. 1079, 383 U.S. 663 (1966) The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct.. 779. Tying the right to challenge the state's attempt to deprive a citizen of his property and the opportunity to be heard is an unconstitutional violation of due process of law.

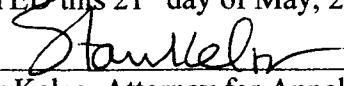
If the requirement of a twenty percent deposit was even arguably constitutional, such a requirement was implicitly repealed in 2009 by the Idaho legislature when it amended Idaho Code section 63-3004 which made the Internal Revenue Code of 1986 in effect on February 17, 2009 applicable for Idaho income tax purposes. U.S. Code section 7491 enacted on January 5, 2009 shifted the burden of proof from the taxpayer to the agency and provided the taxpayer with protection similar to "innocent until proven guilty" whereas the prior status of the law use to be "guilty until the taxpayer proves his innocence." Based upon this statutory change there is not even a "reasonable basis" to require a taxpayer, as a condition of challenging the Tax Commission's actions seeking to take property, to deposit any percentage of the disputed amount. The reasonable and rational approach is to require a "filing fee" just as in District Court or even before the federal Tax Court.

CONCLUSION

The Respondent ISTC's motion to dismiss should be denied.

6 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

DATED this 21st day of May, 2010.


Starr Kelso, Attorney for Appellant Mr. Hart

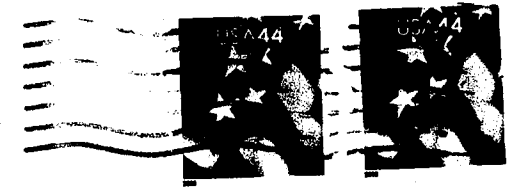
RECEIVED
MAY 24 2010
CLERK OF DISTRICT COURT

CERTIFICATE OF SERVICE: I certify that a copy was mailed to William A. von Tagen attorney for Respondent, postage prepaid, at P.O. Box 36, Boise, Idaho 83722-10 on May 21, 2010 and that a copy was also faxed to him at 208-334-7844 on said date.


Starr Kelso

7 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Starr Kelso
KELSO LAW OFFICE
1621 N. 3rd St, Ste 600 - PO Box 1312
Coeur d'Alene, ID 83816-1312



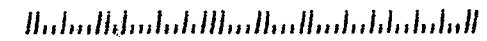
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MAY 24 2010

IDAHO BOARD OF
TAX APPEALS

Board of Tax Appeals
P.O. Box 83720
Boise, ID 83720-0088

83720\$0088



Philip Hart
2900 Government Way 262
Coeur d'Alene, Idaho 83815

April 19, 2010

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

Re: Response to your letter on April 5, 2010.

Dear Board of Tax Appeals:

When I prepared the Notice of Appeal, which I have submitted to your office, I used a set of Rules given to me by my attorney that he recently obtained from your website. These Rules have a footnote in the lower right corner of page 1 that says: "IAC 2000". In those rules I did not find any guidance as to how to report to your office the making of a twenty- percent deposit of the disputed amount. In doing so, I provided a copy of a March 30, 2010 letter along with copies of a cashier's check in the amount of \$7,862.04 and a personal check in the amount of \$1,600.00. My letter also included a promise to deposit the remaining \$1,962.36 with the Tax Commission by April 9, 2010. I have included a copy of this letter.

I do not have any receipts from the Tax Commission for these deposit payments. However, I have written them a letter today asking the Tax Commission to prepare receipts for me. I did visit with my bank today and have discovered that the Tax Commission has cashed the personal checks for \$1,600.00 and \$1,962.36. I have included a copy of this current bank statement obtained by me today. It looks like it takes the Tax Commission about a week from the time a check is mailed to them to the time that check is cashed by the bank.

You will see in my letter of March 30, 2010, I promised to pay the \$1,962.36 balance of the deposit by April 9th. It was impossible for me to put together the full amount without the opportunity to be at home during business hours to organize the remaining \$1,962.36.

According to Blacks Law Dictionary, 6th Edition, a *promise* is,

"A declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing...."

And a *promissory note* is defined as:

"A promise or engagement, in writing, to pay a specified sum at the time therein stated, or on demand, or at sight, to a person therein named, or to his order or bearer. An unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or his order, at a time specified therein...."

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

April 19, 2010
Board of Tax Appeals
page 2

Without guidance from the set of Rules (IAC 2000) I was using in preparation of my Notice of Appeal, I believed my handling of the deposit was reasonable, given that I could not be at home during weekday business hours for the previous three months.

I received the Tax Commission Decision that I am appealing on October 12, 2009, when I picked the letter up from my mailbox. It was received at my mailbox on October 2, 2009. There was a notice included in with the Decision that stated I had 91 days to appeal the Decision. On December 31, 2009 I sent a letter to the Tax Commission that I was planning on appealing the Decision once the Legislative Session was completed, as the time tolls while the legislature is in session, including 10 days prior to the session. I explained my reasons for the timing of my Appeal in that letter, and a copy of that letter is enclosed. I received no response from the Tax Commission to my December 31, 2009 letter. I am a member of the Legislature from legislative district 3.

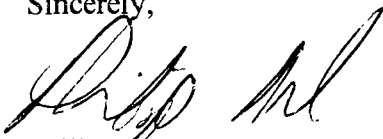
I have also included copies of two Attorney General Opinions that might help you in reviewing this issue. One Opinion is from Arizona and the other is from Wisconsin. Both states have similar language to Idaho's in their state constitutions regarding legislator immunity from civil actions during the time their legislatures are in session. I can attest that for me the legislative sessions are all consuming and I find little time for anything else. I believe the state is better served when representatives and senators are able to focus on the business of the state during this time.

I have also included a letter from my attorney that relates to the issue of legislator immunity that was written for a different purpose, although it does relate to this matter.

The amount in dispute is the combination of the two docket numbers which is \$27,609 plus \$24,518 or \$52,127.

Lastly, I have more documentation that might be helpful, although it is in my office in Boise. I will be in Boise next week and can bring those materials back up to Coeur d'Alene in the event your office needs more information from me. It is also my intention to have my attorney send your office a Notice of Appearance in the next few days.

Sincerely,



Philip Hart

Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

December 31, 2009

Mr. Erick M. Shaner
Deputy Attorney General
State Tax Commission
P. O. Box 36
Boise, Idaho 83722

Dear Mr. Shaner:

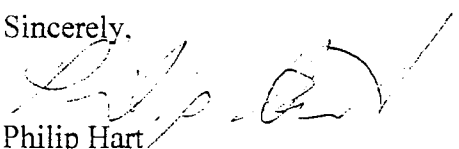
This letter is in response to the Decision made by the Tax Commission which is dated September 30, 2009 for docket numbers 21551 and 21552. That Decision was mailed to me by way of certified mail, item number 7008 1830 0004 0457 9455.

It is my intention to appeal this Decision. The paper work included with the Decision noted that I have 91 days from the date I received this decision to make my appeal. According to Post Office records, this certified mail item was delivered on October 2, 2009. I have enclosed a document referencing that with this letter. As I count the days, the 91 days appeal period runs through January 2, 2010.

However, as a member of the legislature, I can defer filing an appeal and all the work that that entails while the legislature is in session and ten days prior to the beginning of the session. Please refer to Article III, Section 7 of the Idaho Constitution. Since the 2010 session of the Legislature is scheduled to begin on January 11, 2010, the immunity period backs up to today, December 31, 2009 as January 1, 2010 is a holiday.

Consequently, it is my intention to submit my appeal immediately upon adjournment of the 2010 session of the Legislature.

Sincerely,


Philip Hart

Notice of Appeal to the Board of Tax Appeals

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

April 9, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

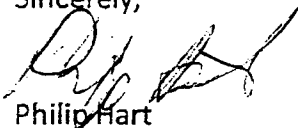
Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

Dear State Tax Commission:

Please find enclosed a deposit check of \$1,962.36 which will bring the total amount deposited for the appeal of the above docket numbers to \$11,424.40.

Please send a receipt for the enclosed check, and for the \$7,862.04 and \$1,600.00 checks that I sent to your office last week. You may send the receipts to my above address.


Sincerely,


Philip Hart

PHILIP L. HART
c/o 2900 GOVERNMENT WAY, #262
COEUR D'ALENE, ID 83815

4402
92-373/1231

DATE April 9 10

PAY
TO THE
ORDER OF State of Idaho \$ 1962.36
Nineteen hundred sixty-two & 36/100 DOLLARS 

IDAHO INDEPENDENT BANK
912 NORTHWEST BOULEVARD
COEUR D'ALENE, IDAHO 83814

ALL RIGHTS RESERVED

FOR _____


MP

11231037321 0100007129 4402

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

In the Matter of the Protest of)

PHILIP L. HART,)

Petitioner.)

DOCKET NOS. 21551 & 21552

DECISION

FACTUAL AND PROCEDURAL BACKGROUND

This is an individual income tax case. Based upon federal income tax information, the Income Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued two Notices of Deficiency Determination (NODs) to Philip L. Hart (Petitioner). Both NODs were dated September 4, 2008. One NOD covers taxable years 1996 through 1998 and references docket number 21551. The other NOD covers taxable years 1999 through 2004 and references docket number 21552. The federal information underlying the NODs in these matters was obtained from an IRS audit resulting in a final federal determination. The NODs advised the Petitioner that if he disagreed with the determination by the Bureau, he could petition the Commission for a redetermination of the NOD.¹

In response, the Petitioner protested the NODs. The Petitioner claimed at this time to have previously paid the 1999 through 2004 liabilities. The Petitioner also claimed the following for all the years in question: "There is no "Final Determination" or "Assessment" of, or liability for, any Federal Tax for the years detailed in the "Notice of Deficiency" and therefore there is no State Tax due or owing for those same years."

¹ The reader of this decision may wonder why two separate NODs were issued. Two separate NODs were issued because the Petitioner had never filed Idaho individual income tax returns for taxable years 1996 through 1998, however, for taxable years 1999 through 2004, a different set of circumstances had occurred. Petitioner filed actual returns and paid any taxes owed per those returns for taxable years 1999 through 2004. Federal information received by the Bureau showed Petitioner owed additional amounts for 1999 through 2004 and the NOD in docket number 21552 was issued to assert those deficiencies.

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IDAHO BOARD OF
TAX APPEALS

The Bureau mailed Petitioner a letter dated November 12, 2008, acknowledging that a protest had been received and that the matter was being transferred to the legal department of the Commission. The legal department sent a letter to the Petitioner dated December 17, 2008, acknowledging that a proper protest had been filed and requesting that the Petitioner indicate whether he wanted an informal hearing.

The Petitioner sent a letter dated January 15, 2009, requesting a hearing and that the hearing be delayed until thirty days after adjournment of the legislative session.² The Commission sent a letter dated February 5, 2009, allowing the hearing to be delayed no later than May 15, 2009. The Petitioner sent a letter to the Commission dated April 29, 2009, requesting again that the hearing be delayed and that within thirty days of the end of the legislative session he would contact the Commission and schedule a hearing. The Commission sent a letter dated May 6, 2009, wherein the Commission again agreed to delay the hearing, but that the hearing would be held within two weeks of the end of the legislative session. The legislative session ended May 8, 2009. The two week time period elapsed without the Petitioner contacting the Commission, however, Petitioner later sent a letter dated June 6, 2009, asking that the hearing be delayed again and providing a range of dates for a hearing between June 23 and July 10, 2009. The Commission again granted a delay to the hearing, which was scheduled and held on July 8, 2009. The Commission received further documentation from the Petitioner on July 7, 2009, as well as at the hearing, in support of his protest. During the hearing, the Petitioner agreed to provide the Commission with information regarding his appeals with the Internal Revenue Service by July 24, 2009.

The Commission sent a letter dated July 9, 2009, to the Petitioner reminding him of his agreement to supply the IRS appeal information by July 24, 2009. The Commission received a request from the Petitioner on July 13, 2009, in which the Petitioner requested copies of "all

² Petitioner is a member of the Idaho State Legislature, House of Representatives from District 3.

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IDAHO BOARD OF
TAX APPEALS

documents that you used to arrive at both of the "Notice of Deficiency Determination"(s) dated September 4, 2008." The Commission copied those documents and provided them to the Petitioner in a letter dated July 21, 2009. The Commission received a phone call and fax on July 24, 2009, from a law firm in Spokane, Washington, in which a law firm paralegal indicated that one of its lawyers would be sending the Commission a letter in the following week regarding the Petitioner's tax matters. The law firm never sent the Commission any other correspondence, however, Petitioner provided the Commission with a letter that a Spokane, Washington law firm sent to Petitioner. This letter accompanied additional materials the Petitioner provided to the Commission on September 10, 2009, in support of his protest. The Commission has not received any further communications from the Petitioner or anyone else claiming to represent him. The Commission also has not as of the date of this decision received the IRS appeal information the Petitioner indicated he would provide. The Commission now issues this decision based upon the material currently in the file.

PROTESTED ISSUES AND ANALYSIS

Petitioner provides five arguments to support his protest. The first is an argument regarding serving civil process on a legislator. The second argument is the old and tired unapportioned direct tax argument. The third argument is in regard to whether Idaho may proceed with this matter when, according to the Petitioner, no assessment exists at the federal tax level. The fourth argument is that the Petitioner believes the income information provided to the Commission by the federal government is incorrect. The fifth, and last argument, is that the Idaho income tax does not conform to the uniformity requirements of Article VII, Section 5 of the Idaho Constitution. These arguments are addressed below.

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IDAHO BOARD OF
TAX APPEALS

Serving of Civil Process and Federal Assessment

Petitioner alleges that the federal government issued a deficiency notice to him and demanded a response during the time he was serving in the 2008 Idaho legislature. Petitioner claims that he should be free from civil process during the time he is serving in the legislature according to Idaho Constitution, Article III, Section 7, which reads in pertinent part: "Senators and representatives in all cases . . . shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof . . ."

Petitioner believes these circumstances should somehow bar Idaho from proceeding on its NODs in these matters. The Bureau's NODs are at issue in this matter. What the federal government has done regarding the referenced constitutional timeframes in its enforcement of federal taxes is not at issue in this matter. Even assuming that Idaho Constitution, Article III, Section 7, may apply to administrative proceedings, the Commission has not required the Petitioner to engage in any process during the applicable constitutional timeframes and has in fact given substantial deference to Petitioner's legislative schedule.³

Petitioner also believes that because the federal government has not provided him a copy of his "assessment," that this should also bar Idaho from proceeding on its NODs in these matters.

Again, the Bureau's NODs are at issue in this matter. As stated above, the manner in which the federal government addresses its tax matters with Petitioner, insofar as these arguments are concerned, is irrelevant to a discussion regarding whether the Bureau's NODs are upheld.

³ The letter referenced above from the Spokane, Washington attorney addresses the legislative immunity issue. Even assuming that the IRS's actions that Petitioner claims took place during times when he should have had Idaho legislative immunity and that those actions were in regards to tax information upon which the Tax Commission based its NODs, the Tax Commission does not find the letter persuasive. The attorney is unable to cite any legal precedent that specifically addresses the application of Article III, Section 7, of the Idaho Constitution to IRS proceedings or Idaho tax administrative proceedings. The Petitioner also argues that Idaho's NODs are invalid because of the "fruit of the poisonous tree." The Commission assumes that Petitioner is making reference to law limiting the introduction of evidence if it is obtained illegally in criminal proceedings. The Commission does not find that the fruit of the poisonous tree doctrine has application in these civil administrative proceedings.

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IDAHO BOARD OF
TAX APPEALS

Unapportioned Direct Tax

Petitioner argues that the Bureau's NODs are based upon a federal tax and, therefore, do not conform to the taxation authority granted by the United States Constitution because it is an unapportioned direct tax.

State and federal courts have rejected this type of theme time and time again. In Coleman v. Commissioner of Internal Revenue, 791 F.2d 68 (C.A. 7 (Ind.) 1986), Judge Easterbrook penned:

Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead--so tax protesters think--to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.

The Petitioner asserts similar arguments as discussed by Judge Easterbrook. He believes his tax obligation has somehow been eliminated despite the fact that he lives in Idaho and earned a living in Idaho. Simply stated, the Petitioner's arguments are not supported by fact or law.

Idaho Code § 63-3002 provides what is taxable income as follows:

63-3002. Declaration of intent. It is the intent of the legislature by the adoption of this act, insofar as possible to make the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue Code relating to the measurement of taxable income, to the end that the taxable income reported each taxable year by a petitioner to the internal revenue service shall be the identical sum reported to this state, subject only to modifications contained in the Idaho law; to achieve this result by the application of the various provisions of the Federal Internal Revenue Code relating to the definition of income, exceptions therefrom, deductions (personal and otherwise), accounting methods, taxation of trusts, estates, partnerships and corporations, basis and other pertinent provisions to gross income as defined therein, resulting in an amount called "taxable income" in the Internal Revenue Code, and then to impose the provisions of this act thereon to derive a sum called "Idaho taxable income"; to impose a tax on residents of this state measured by Idaho taxable income wherever derived and on the Idaho taxable income of nonresidents which is the result of activity within or derived from sources within this state. All of the foregoing is subject to modifications in Idaho law including, without limitation, modifications

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IDAHO BOARD OF
TAX APPEALS

The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In McCulloch v. Maryland, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the federal government, Mr. Chief Justice Marshall, speaking for the court, conceded that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction saying: "It is obvious, that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation," etc.

In Michigan Central Railroad v. Powers, 201 U.S. 245, 292, 293, the court, by Mr. Justice Brewer, said: "We have had frequent occasion to consider questions of state taxation in the light of the federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods."

That a state may tax callings and occupations as well as persons and property has long been recognized.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business.*** It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Id. at 51-52. (Citations omitted.) See also, People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-13 (1937).

Federal Information

Here, the Petitioner argues that the information the Bureau obtained regarding his income from the federal government was incorrect. He argues that the federal government incorrectly calculated his income and that the Commission should not rely on this information.

However, Petitioner has failed to present any supporting records to support his assertions. Petitioner's argument, in this regard, will not receive further review from the Commission. The Commission does not infer that, even if it were to receive supporting documentation from

Petitioner, that the Commission would modify its NODs. The Petitioner carries the burden to prove that the Commission's NODs are incorrect.

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APR 21 2010

Article VII, Section 5

IDAHO BOARD OF
TAX APPEALS

Lastly, the Petitioner believes that because the Idaho income tax is a graduated tax it fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution. The Petitioner weaves this argument using broken thread. The legislature in Idaho Code § 63-3002 states the intent to make "insofar as possible . . . the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue code . . . subject only to modifications contained in the Idaho law;" (emphasis added). The Petitioner fails to understand that the fabric of the Idaho income tax is Idaho law and not the Internal Revenue Code.⁴ The Internal Revenue Code may be used to provide guidance, but the Idaho income tax is woven by Idaho law using Idaho statutory thread. The Petitioner misreads Idaho Code § 63-3002. Idaho Code § 63-3002 only includes intent language. The Idaho income tax requirements are as set out in Idaho Code § 63-3022, and other applicable provisions of Idaho law. The final sentence in Idaho Code § 63-3002 also clearly states that, "All of the foregoing is subject to modifications in Idaho law . . ." In addition, the Idaho legislature specifically provided in Idaho Code § 63-3080 that the Idaho income tax is not a property tax. Therefore, as ruled by the Idaho Supreme Court in Diefendorf v. Gallet, 51 Idaho 619, 10 P.2d 307, (1932), the Idaho income tax act is not a property tax. The property tax uniformity provisions of Article VII, Section 5 of the Idaho Constitution that prohibit a graduated property tax are not applicable to the Idaho income tax.

CONCLUSION

It is well settled in Idaho that a Notice of Deficiency Determination issued by the Idaho State Commission is presumed to be correct. Albertson's Inc. v. State, Dept. of Revenue, 106

⁴ The Commission also finds that the case law Petitioner cites does not support his theory that the federal income tax is a property tax.

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IDAHO BOARD OF
TAX APPEALS

Idaho 810, 814 (1984); Parsons v. Idaho State Tax Commission, 110 Idaho 572, 574-575 fn.2 (Ct. App. 1986). The burden is on the Petitioner to show that the tax deficiency is erroneous. Id. Since the Petitioner has failed to meet this burden, the Commission finds that the amount shown due on the Notice of Deficiency Determination is true and correct.

The Bureau also added interest, which interest will continue to accrue pending payment of the tax liability pursuant to Idaho Code § 63-3045(6), and penalty to the Petitioner's tax deficiency. The Commission finds those additions appropriate as provided for in Idaho Code §§ 63-3045 and 63-3046.

WHEREFORE, the Notices of Deficiency Determination dated September 4, 2008, are hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the Petitioner pay the following tax, penalty, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1996	\$2,879	\$ 720	\$2,460	\$ 6,059
1997	8,387	2,097	6,429	16,913
1998	2,736	684	1,887	5,307
1999	2,281	570	1,406	4,257
2000	2,928	732	1,572	5,232
2001	3,680	920	1,692	6,292
2002	2,133	533	843	3,509
2003	1,683	421	576	2,680
2004	2,286	343	645	3,274
			TOTAL	<u>\$53,523</u>

Interest is calculated through October 15, 2009.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

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APR 21 2010

An explanation of the Petitioner's right to appeal this decision is enclosed.

IDAHO BOARD OF
TAX APPEALS

DATED this 30 day of September, 2009.

IDAHO STATE TAX COMMISSION

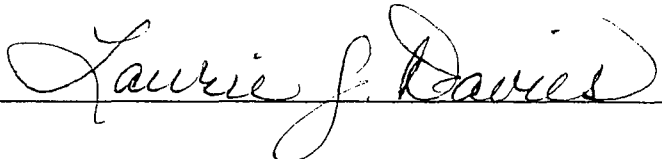

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of September, 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

PHILIP L. HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE, ID 83815

Receipt No 7008 1830 0004 0457 9455


Laurie J. Davies

RECEIVED

APR 21 2010

Monday Apr 19, 2010 12:38 PM

IDAHO BOARD OF
TAX APPEALS

PHILIP L HART
DBA ALPINE PRESS
2900 N GOVERNMENT WAY #262
COEUR D ALENE ID 83815-3751

Account 100007129
Balance 968.07
Date Last Stmt 03/31/2010

Date	Description	Check Reference	Amount	Balance
04/02/2010	Deposit		137.02	2,337.22
	572006190 04/02/2010			
04/05/2010	Deposit		850.00	3,187.22
	536000160 04/05/2010			
04/05/2010	Inc Clearing Check	4392	1,600.00	1,587.22
	52085310 04/05/2010			
04/05/2010	Inc Clearing Check	4391	150.00	1,437.22
	8006110 04/05/2010			
04/07/2010	Deposit		1,098.00	2,535.22
	72006180 04/07/2010			
04/08/2010	Inc Clearing Check	4394	177.00	2,358.22
	35051270 04/08/2010			
04/09/2010	Deposit		1,800.00	4,158.22
	63006770 04/09/2010			
04/09/2010	Inc Clearing Check	4396	350.00	3,808.22
	18025070 04/09/2010			
04/12/2010	Deposit		700.00	4,508.22
	114016630 04/12/2010			
04/12/2010	Deposit		67.00	4,575.22
	80005600 04/12/2010			
04/12/2010	ACH Deposit		172.08	4,747.30
	0			
		PAYPAL TRANSFER TRANSFER		
04/12/2010	ACH Payment	4399	400.07	4,347.23
	0			
		FIA CardServices 18004212110 CHECK PYMT		
04/13/2010	ACH Payment	4397	47.82	4,299.41
	0			
		INTERMOUNTAIN G CHECKPAYMT		
04/13/2010	Inc Clearing Check	4398	200.00	4,099.41
	25044960 04/13/2010			
04/14/2010	Deposit		402.00	4,501.41
	57002550 04/14/2010			
04/14/2010	Check	4401	75.20	4,426.21
	58001370 04/14/2010			
04/15/2010	Inc Clearing Check	4395	400.00	4,026.21
	37054720 04/15/2010			
04/15/2010	Inc Clearing Check	4400	387.41	3,638.80
	21029370 04/15/2010			
04/16/2010	Deposit		100.00	3,738.80
	66008600 04/16/2010			
04/16/2010	Deposit		25.00	3,763.80
	66008620 04/16/2010			
04/16/2010	Inc Clearing Check	4402	1,962.36	1,801.44
	41073760 04/16/2010			

Monday Apr 19, 2010 12:38 PM

PHILIP L HART
DBA ALPINE PRESS
2900 N GOVERNMENT WAY #262
COEUR D ALENE ID 83815-3751

Account 100007129
Balance 968.07
Date Last Stmt 03/31/2010

Date	Description	Check Reference	Amount	Balance
04/16/2010	Inclearing Check 21033740 04/16/2010	4405	800.00	1,001.44
04/16/2010	Inclearing Check 31044100 04/16/2010	4403	33.37	968.07
	Inclearing Check 35047150 04/19/2010	4393	250.00	718.07



OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOL. XX

January 1, 1931 through December 31, 1931

JOHN W. REYNOLDS

Attorney General



MADISON, WISCONSIN

1931

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

board [state board of
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*Courts — Garnishment — Quasi-Garnishment — Legisla-
ture —* Members of legislature are liable to quasi-garnish-
ment statute at all times except during either regular or
special sessions of legislature and fifteen days next before
commencement and after termination of each session

RECEIVED

July 20, 1931. APR 21 2010

THEODORE DAMMANN,
Secretary of State.

IDAHO BOARD OF
TAX APPEALS

Your request for an opinion reads as follows:

"On January 23, 1931, an opinion was rendered by your
department to the secretary of state to the effect that mem-
bers of the legislature are exempt from section 304.21,
known as the quasi-garnishment statute, during the session
of the legislature and fifteen days before and after.

"Does section 304.21 apply to members of the legislature
before and after the above-mentioned period? How does
this section affect the members so far as a special session
is concerned?"

Sec. 304.21, Stats., provides the method for the quasi-
garnishment of public employees. In XX Op. Atty. Gen.
29, 31, it was held that this section is not applicable to
members of the legislature during the session in view of
sec. 15, art. IV, Wisconsin constitution. In that opinion
it was said:

"This opinion is limited to the application of sec. 304.21,
Stats., during the session of the legislature and fifteen days
before and after; no opinion is being expressed on the ap-
plication of this section after the session of the legislature."

That opinion was based on the constitutional provision
which provides that members of the legislature shall not
"be subject to any civil process during the session of the
legislature, nor for fifteen days next before the commence-
ment and after the termination of each session." (Sec. 15,
art. IV, Wis. Const.)

The reasoning which led to the opinion that members of
the legislature were exempt from the quasi-garnishment
provisions during the session of the legislature and for fif-
teen days before and after the session involves as a corollary

APR 21 2010

530

OPINIONS OF THE ATTORNEY GENERAL
IDAHO BOARD OF
TAX APPEALS

an opinion that members of the legislature are liable to the quasi-garnishment statute at all other times.

No distinction is made in sec. 15, art. IV, Wis. Const., between regular sessions and special sessions. All of the reasons which led to the granting of immunity to members of the legislature during regular sessions apply with equal force to special sessions and therefore the opinion which I rendered on January 23, 1931 (XX Op. Atty. Gen. 29) must be held as applying to special as well as regular sessions of the legislature.

JWR

Courts — County judge who commits A and B on same day on criminal charges and commits C to hospital for insane is entitled to five dollars for commitment of A and B under subsec. (2), sec. 253.15, Stats., and to five dollars for committing C to hospital for insane under subsec. (1), sec. 51.07.

July 20, 1931.

F. W. HORNE,

District Attorney,

Crandon, Wisconsin.

You state in your letter of July 15 that the judiciary committee of the county board has requested you to write to inquire of me whether in the official opinion of the 24th of June, XX Op. Atty. Gen. 457, it was intended that the \$5.00 per day mentioned should include the commitment to the hospital for the insane as well as the two criminal commitments, or whether under subsec. (1), sec. 51.07, Stats., the commitment to the hospital for the insane would entitle the county judge to receive five dollars in addition to five dollars received for criminal commitments.

The opinion of the 24th of June simply held that a county judge is entitled to five dollars per day under subsec. (2), sec. 253.15, although he passes upon a number of commitments on the same day, and he is not entitled to five dollars for each commitment on the same day. This had reference

MORRISON

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ARIZONA ATTORNEY GENERAL

January 13, 1956
Opinion No. 56-24
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A. R. 21 2010

REQUESTED BY: E. T. Williams, Jr.
State Treasurer

IDAHO BOARD OF
TAX APPEALS

OPINION BY: ROBERT MORRISON, The Attorney General

QUESTION: May a Legislator's salary be garnisheed during
the session of the Legislature?

CONCLUSION: No.

Article 4, Part 2, Section 6, of the Constitution, provides as follows:

"Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session."

A. R. S. § 12-1601 reads as follows:

"The salaries of officers, deputies, clerks and employees of the state or its political subdivisions shall be subject to garnishment as provided in this article, and such garnishment shall not be construed as against public policy."

The case of Fuller vs. Barton, 208 N. W. 696, is the only case squarely on point which interprets a similar constitutional provision and a statutory provision authorizing garnishments. In that case, the Court held:

"The Legislature, by this act, undoubtedly authorizes garnishee proceedings against the state in certain cases, but subject to the foregoing constitutional provision. When the constitutional provision and the legislative act are read together, there is little difficulty in construing the law. But it is said that Mr. Culver does not come within the constitutional exception, because judgment had theretofore been obtained and the garnishee process was served upon the state. This is a too narrow view of the situation. The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before and after, so that the state could have their undivided time and attention in public affairs. Mr. Culver,

E. T. Williams, Jr.
State Treasurer

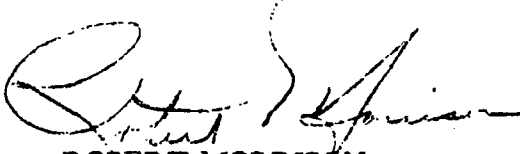
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APR 21 2010
IDAHO BOARD OF
TAX APPEALS

January 13, 1956
Page Two

as principal defendant, had the right to make a defense to the garnishee proceeding. In the present case the garnishee proceeding succeeded in doing just what the constitutional provision was created to avoid. It harrassed the legislator, drove him to make a defense in the garnishee proceeding, and deprived him of the means of subsistence pending the balance of the session. We think the case clearly comes within the constitutional inhibition."

It is my opinion that the Arizona constitutional provision prohibits garnishment proceedings, and, therefore, you should not honor any garnishments involving any legislator during the sessions of the Legislature.

Opinion No. 54-58-L is hereby overruled.


ROBERT MORRISON
The Attorney General

gb

56-24

Spokane Office
Bank of America Financial Center
601 W. Riverside, Suite 1900
Spokane, Washington 99201-0695

Phone: (509) 838-6131
Fax: (509) 838-1416
website: www.winstoncashatt.com

Winston & Cashatt

L A W Y E R S

A Professional Service Corporation

*Winston & Cashatt has offices in Spokane, Washington
and Coeur d'Alene, Idaho*

September 3, 2009

RECEIVED

APR 21 10

IDAHO BOARD OF
TAX APPEALS

Philip Hart
2900 Government Way, #262
Coeur d'Alene, ID 83815

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

Re: Rules of Decisions Statute of the United States of America

Dear Phil:

You requested this office to provide information concerning the application of the State Laws as Rules of Decision statute of the United States of America (28 USC §1652) to the service of a notice of deficiency (NOD) by the Internal Revenue Service ("IRS") on a state legislator in light of the specific provisions of the Idaho Constitution providing legislative immunity from "civil process" during the time a legislator is in session. Please note that we have intentionally omitted citations to cases discussing this matter. Should you require citations, we will be happy to provide them.

The specific facts provided to us are that you are a state legislator in the state of Idaho. An NOD dated the first week of January was mailed to you and received by in that week. The legislative session commenced January 7 of that year and continued for approximately three months. The NOD identified a tax deficiency that was civil in nature and did not involve any allegation of criminal tax evasion or any crimes under the Internal Revenue Code ("IRC"). In another matter with the IRS, you were issued a document subpoena by an employee of the IRS while attending a one day special session of the Idaho state legislature and once the IRS was advised that the legislature was "in session" a second subpoena was served on you at a time the legislature was not in session.

The State Laws as Rules of Decision statute (28 USC §1652) provides as follows:

C. Matthew Andersen *id*
Beverly L. Anderson
Courtney R. Beaudoin *id*
Robert P. Beschel
Kevin H. Breck *id*
Richard L. Cease
Christopher S. Crago
Patrick J. Cronin *id*
Kevin J. Curtis *ca*
Greg M. Devlin *id*

Stephen L. Farnell
David P. Gardner
Donald J. Gary, Jr. *ca*
Jeffrey A. Herbster *id*
Tim M. Higgins
Michael T. Howard *id*
Carl E. Hueber *id*
Nancy L. Isserlis *id*
Brian T. McGinn *id*
Kammi Mencke Smith *id*

Sean F. O'Quinn
Fred C. Pflanz
Lynden O. Rasmussen
James E. Reed
Richard W. Relyea
Eowen S. Rosentrater
Elizabeth A. Tellesen *id*
Lawrence H. Vance, Jr. *id*
Lucinda S. Whaley
Meriwether D. Williams *id*

Ryan D. Yahne *id* *ca*

Of Counsel
James P. Connelly

Retired
Leo J. Driscoll
Leo N. Cashatt 1910-1977
Joseph J. Rekofke 1921-1997
Patrick H. Winston 1904-1996

All lawyers admitted in WA. Lawyers admitted in: CA, ID, MI and WY as indicated.

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

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APR 21 2010

The Idaho Constitution at Article III, Section 7, provides as follows:

IDAHO BOARD OF
TAX APPEALS

PRIVILEGE FROM ARREST. Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and *shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof*; nor shall a member, for words uttered in debate in either house, be questioned in any other place. (emphasis added)

Both federal and state courts have addressed the issue of legislative immunity. The doctrine granting legislative immunity is founded in English Common law and is expressed in the Constitution of the United States (Article I, Section 6). Although not specifically stated in the Constitution, legislative immunity has been extended to immunity from civil process. The rationale for legislative immunity is to protect the electorate and the democratic process from interference while a representative is performing his or her civic duties. In most states where immunity from civil process has been specifically adopted either constitutionally or by statute, courts have held that the immunity is tantamount to a common law right that is substantially inviolate. For example, in *Supreme Court of Virginia v Consumers Union of United States*, the U.S. Supreme Court held that failure to raise a defense of legislative immunity did not necessarily constitute a waiver of the defense. The court reasoned that where both the possibility and validity of an immunity defense were apparent from the beginning and the plaintiff had shown no prejudice as a result of the time of the assertion of the defense, raising of the defense late was timely. Recognition of legislative immunity has long been recognized in the U.S. The court for the territory of Wisconsin addressed the issue in 1849 and noted that judicial immunity has been acknowledged and respected from the inception of the country.

No courts have ruled specifically on the application of legislative immunity with respect to NODs issued by the IRS in connection with a proposed adjustment to income tax. Clearly, the NOD issued to you relates to a proposed adjustment of your taxable income in a "civil" context and not in a "criminal" context. There is no allegation or suggestion of any "treason, felony or breach of the peace" in connection with the NOD sent to you. Therefore, it appears that you are privileged to argue that the issuance of the NOD was ineffective under the legislative immunity provisions of the Idaho Constitution. Moreover, the IRS would not be prejudiced by any such claim because the IRS would still have time following the legislative session in which it could issue a NOD. It is also important to note that the matter is not final because you continue to have the right to pay tax and request a refund. Should the IRS deny your request for refund, you would still be entitled to file suit in federal court (US District Court or Court of Claims) with respect to your refund claim.

Philip Hart
September 3, 2009
Page 3

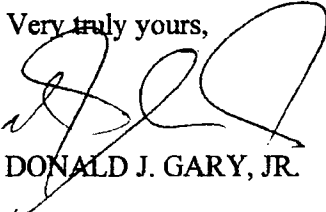
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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

We trust this will assist you with your inquiry. Should you have any further questions, please do not hesitate to contact our office.

Very truly yours,



DONALD J. GARY, JR.

DJG:car
161714

Notice of Appeal to the Board of Tax Appeals

March 30, 2010

RECEIVED

APR 21 2010

IDAHO BOARD OF
TAX APPEALS

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

Dear State Tax Commission:

Please find enclosed a deposit of \$7,862.04 and \$1,600.00 to cover the twenty percent cash deposit required by Idaho Code 63-3049 (b). The amount of the alleged deficiency for these two docket numbers is \$27,609 plus \$24,518. Twenty percent of this amount is \$11,424.40.

Please consider this letter my promise to pay the remaining \$1,962.36. I am a member of the Legislature and have been in Boise since early January, except for weekends. I need to return home to the Coeur d'Alene area and be there during business hours in order to send the remaining \$1,962.36 to your office. The Legislature adjourned yesterday, and I expect to be back home by the end of this week. By April 9th I can have a check in the mail to your office for the remaining \$1,962.36.

The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the State Tax Commission

Sincerely,

Philip Hart

CERTIFIED MAIL



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APR 18 '10
AMOUNT

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APR 21 2010

IDAHO BOARD OF
TAX APPEALS

applicable to unitary groups of corporations, which include corporations incorporated outside the United States.

As incorporated into the Income Tax Act by Idaho Code § 63-3002, individuals are subject to Idaho income tax on their income from all sources, unless express federal or state exemptions, adjustments, or limitations apply. The Petitioner has not provided any information to establish that his income is exempt under the Internal Revenue Code or under any other law.

Petitioner has income and is required to file and pay taxes for the taxable years 1996 through 2004. Under our federalist system of government, the power to raise revenue to support the functioning of the government [i.e., the power to tax] is generally considered a concurrent state and federal power. The power of the states to tax the income of individuals was first established by the United States Supreme Court in Shaffer v. Carter, 252 U.S. 37, 50 (1920). In that case, Shaffer brought suit to enjoin the state of Oklahoma from collecting any tax assessed against him under the state's income tax law. Although Shaffer was a nonresident of Oklahoma, the Court found that the Oklahoma tax on his Oklahoma source income was constitutional. Justice Pitney, writing for the Court, stated:

In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses.

Justice Pitney went on to write:

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution.

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Hart

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APR 26 2010

IDAHO BOARD OF
TAX APPEALS

STATE OF IDAHO
BOARD OF TAX APPEALS


PHILIP L. HART, : APPEAL NO. 10-B-1289
Appellant

vs. : NOTICE OF APPEARANCE

TAX COMMISSION OF
THE STATE OF IDAHO, :
Respondent. :


COMES NOW Starr Kelso, attorney at law, and hereby appears as counsel for the
above named Appellant Philip L. Hart. All future documents in this matter should be forwarded
to Counsel at the above address.

Dated this 22nd day of April, 2010.



Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to the Idaho State Tax Commission on the
22nd day of April, 2010 at 800 Park Blvd., Plaza IV, Boise, Idaho 83722.



Starr Kelso

1 NOTICE OF APPEARANCE

Starr Kelso
KELSO LAW OFFICE
1621 N. 3rd St, Ste 600 - PO Box 1312
Coeur d'Alene, ID 83816-1312

SPokane WA 992

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APR 26 2010

IDAHO BOARD OF
TAX APPEALS

State of Idaho Board of Tax Appeals
P.O. Box 83720
Boise, Id 83720-0088

83720+0088



STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Hart

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MAY 04 2010

IDAHO BOARD OF
TAX APPEALS

Faxed. *CA*

STATE OF IDAHO
BOARD OF TAX APPEALS

PHILIP L. HART,
Appellant

: APPEAL NO. 10-B-1289

vs.

: NOTICE OF APPEARANCE

TAX COMMISSION OF
THE STATE OF IDAHO,
Respondent.

:

:

COMES NOW Starr Kelso, attorney at law, and hereby appears as counsel for the
above named Appellant Philip L. Hart. All future documents in this matter should be forwarded
to Counsel at the above address.

Dated this 22nd day of April, 2010.

Starr Kelso
Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to the Idaho State Tax Commission on the
22nd day of April, 2010 at 800 Park Blvd., Plaza IV, Boise, Idaho 83722.

Starr Kelso
Starr Kelso

1 NOTICE OF APPEARANCE



KELSO LAW OFFICE

1621 N. Third St., Suite 600
 P.O. Box 1312
 Coeur d'Alene, ID. 83816
 Ph: (208)765-3260 - Fax: (208)664-6261
starr.kelso@verizon.net

"Never Give Up, Never Give In"

Attorney:

Starr Kelso

Licensed In:
 Idaho
 Montana
 Colorado

May 4, 2010

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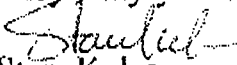
MAY 04 2010

State of Idaho
 Board of Tax Appeals
 Via Fax: 208-334-4060

RE: Appeal No. 10-B-1289
 Hart

Dear Reader:

I am faxing herewith a Notice of Appearance. I just received today a copy of the Idaho State Tax Commission's Motion to Dismiss. I respectfully request a reasonable time to respond thereto.

Very truly yours,

 Starr Kelso

C: William A. von Tagen via fax:208-334-7844
 Philip L. Hart



KELSO LAW OFFICE

1621 N. Third St., Suite 600
P.O. Box 1312
Coeur d'Alene, ID. 83816
Ph: (208)765-3260 - Fax: (208)664-6261
starr.kelso@verizon.net

"Never Give Up, Never Give In"

Attorney:

Starr Kelso

Licensed In:
Idaho
Montana
Colorado

May 4, 2010

State of Idaho
Board of Tax Appeals
Via Fax: 208-334-4060

RE: Appeal No. 10-B-1289
Hart

Dear Reader:

I am faxing herewith a Notice of Appearance. I just received today a copy of the Idaho State Tax Commission's Motion to Dismiss. I respectfully request a reasonable time to respond thereto.

Very truly yours,


Starr Kelso

C: William A. von Tagen via fax:208-334-7844
Philip L. Hart

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MAY 04 2010

RECEIVED

MAY 04 2010

Attorney for Mr. Hart

STATE OF IDAHO
BOARD OF TAX APPEALS

PHILIP L. HART,
Appellant

: APPEAL NO. 10-B-1289

vs.

: NOTICE OF APPEARANCE

TAX COMMISSION OF
THE STATE OF IDAHO,
Respondent.

COMES NOW Starr Kelso, attorney at law, and hereby appears as counsel for the above named Appellant Philip L. Hart. All future documents in this matter should be forwarded to Counsel at the above address.

Dated this 22nd day of April, 2010.

Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to the Idaho State Tax Commission on the 22nd day of April, 2010 at 800 Park Blvd., Plaza IV, Boise, Idaho 83722.

Starr Kelso

NOTICE OF APPEARANCE

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Appellant Mr. Hart

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MAY 21 2010

IDAHO BOARD OF
TAX APPEALS

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,
Appellant

: APPEAL NO. 10-B-1289

vs.

APPELLANT MR. HART'S
: MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS

IDAHO STATE TAX COMMISSION
Respondent.

COMES NOW Appellant Philip L. Hart (Mr. Hart), by and through his attorney, and files this Memorandum in Opposition to the Idaho State Tax Commission's (ISTC) Motion to Dismiss.

INTRODUCTION

This memorandum is being submitted following conversations with Board staff that represented that a brief filed before May 24th would be timely and despite the fact that a Motion for An Extension of Time was filed earlier today. If the Board grants the Motion for An Extension of Time the right to supplement this memorandum is reserved.

FACTS

Mr. Hart received a copy of the ISTC's decision on October 2, 2009. Because the 91 day time period to file an appeal with this Board would have run on a Saturday the appeal, absent other circumstances, would have been due by January 4, 2010. As a member of the 2010 Idaho State Legislature, Mr. Hart is not liable to any civil process during the session of the legislature, nor during the ten days next before the commencement there. Art. III, Section 7 Idaho Constitution. It is a matter of common knowledge that the Idaho Legislature convened on

1 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

January 11, 2010 and the preceding next ten days, because of a national holiday, is December 31, 2009. On December 31, 2009 Mr. Hart advised the ISTC of his appeal of its decisions. The number of days from December 31, 2009 through January 4, 2010 is four.

RECEIVED

MAY 21 2010

The Idaho Legislature adjourned on March 29, 2010. On March 30, 2010, the appeal time began to run again and the four days would extend through April 2, 2010. On March 30, 2010 Mr. Hart sent his Notice of Appeal that was lodged with the Board and received by the ISTC on March 31, 2010. The ISTC also received Mr. Hart's checks and the promise to pay.

The ISTC accepted the checks of Mr. Hart, his promise to pay, and his check in fulfillment of his promise to pay. In lieu of a cash deposit a taxpayer may deposit any other type of security acceptable to the tax commission. I. C. 63-3049 (b). The ISTC has never advised Mr. Hart that his promise to pay was not acceptable security. ISTC cashed Mr. Hart's check in fulfillment of his promise.

On January 5, 2009 U.S. Code section 7491 was adopted. It changed the ultimate burden of proof in tax appeals from the taxpayer to the revenue service. I.C. section 63-3002 makes Idaho act identical to the provisions of the federal act. I.C. section 63-3004 adopted the federal code as in effect on February 17, 2009.

ARGUMENT

The ISTC's argument claims lack of timeliness and failure to post bond. Each prong of the argument will be addressed below:

Mr. Hart Perfected His Appeal

(a) The appeal was timely filed.

Article III Section 7 of the Idaho Constitution specifically provides that any Idaho State Representative, such as Mr. Hart, "shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof..."

The question presented by Article III is what is "any civil process"? Respondent ISTC has chosen to ignore the adjective "any" and limited its argument to two a combination of two words that it chooses to combine as one word labeling it a noun. It has provided a cite to a copyrighted dictionary of 2002 vintage. Counsel for Appellant Mr. Hart has been unable to locate a copy of that dictionary and further has been unable to locate "civil process" by internet search. Indeed Blacks Law Dictionary, 1968, does not contain "civil process." The ISTC by eliminating "any"

and seeking to combine "civil process" into a noun suggests that it is a limited "word" that only refers to a "summons" or a "subpoena" or a "warrant."

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Appellant Mr. Hart submits that the word "any" is critical to Article III Section 7 interpretation and further that the words "civil" and "process" are two distinct words with the word "civil" being an adjective and the word "process" being a noun. It is fundamental and universally accepted that statutes must be read to give effect to every word, clause and sentence. *Wright v. Willer*, 111 Idaho 474, 725 P. 2d 179 (1986)

There is no definition for a noun "civil process" as set forth in the 2010 Merriam-Webster on-line dictionary. The 2010 Merriam-Webster on-line dictionary treats the two words separately. Even if there is a one word noun, "civil procedure" it is beyond dispute that statutes are to be read and obeyed by the people according to their common usage among the great mass of the people who are expected to read and obey them. *City of Lewiston v. Mathewson*, 78 Idaho 374, 354, 303 P.2d 680, 684 (1965). Indeed the *City of Lewiston v. Mathewson* case addresses the construction of a statute that has the adjective "junk" with the noun "dealer." It does not treat the words "junk dealer" as a one word noun. The Court carefully analyses the two words one by one to interpret the meaning of the statute. The respective definitions of the words "civil" as an adjective and "process" as a noun are as follows:

MLA Style

"civil." *Merriam-Webster Online Dictionary*. 2010.
Merriam-Webster Online. 21 May 2010
<<http://www.merriam-webster.com/dictionary/civil>>

APA Style

civil. (2010). In *Merriam-Webster Online Dictionary*.
Retrieved May 21, 2010, from <http://www.merriam-webster.com/dictionary/civil>

CIVIL

Pronunciation: \ˈsi-vəl\

Function: *adjective*

Etymology: Middle English, from Middle French, from Latin *civilis*, from *civis*

Date: 14th century

- 1 **a** : of or relating to citizens **b** : of or relating to the state or its citizenry <civil strife>
2 **a** : CIVILIZED <civil society> **b** : adequate in courtesy and politeness : MANNERLY <a civil question>
3 **a** : of, relating to, or based on civil law **b** : relating to private rights and to remedies sought by action or suit distinct from criminal proceedings **c** : established by law

3 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

4 : of, relating to, or involving the general public, their activities, needs, or ways, or civic affairs as distinguished from special (as military or religious) affairs

1.

Main Entry: **'pro·cess**

Pronunciation: \ˈprā-sēs, ˈprō-, -səs\

Function: *noun*

Inflected Form(s): plural **pro·cess·es** \-,se-səz, -sə-, -sēz\

Etymology: Middle English *proces*, from Anglo-French *procés*, from Latin *processus*, from *procedere*

Date: 14th century

1 a : PROGRESS, ADVANCE <in the process of time> **b** : something going on :

PROCEEDING

3 a : the whole course of proceedings in a legal action **b** : the summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders

The word "any" which the ISTC wishes to ignore is far reaching. As reflected by the Merriam-Webster 2010 on-line edition its scope is all encompassing:

Main Entry: **'any**

Pronunciation: \ˈe-nē\

Function: *adjective*

Etymology: Middle English, from Old English *ænig*; akin to Old High German *einag* any, Old English *ān* one — more at ONE

Date: before 12th century

1 : one or some indiscriminately of whatever kind: **a** : one or another taken at random <ask any man you meet> **b** : EVERY — used to indicate one selected without restriction <any child would know that>

2 : one, some, or all indiscriminately of whatever quantity: **a** : one or more —used to indicate an undetermined number or amount <have you any money> **b** : ALL —used to indicate a maximum or whole <needs any help he can get> **c** : a or some without reference to quantity or extent <grateful for any favor at all>

3 a : unmeasured or unlimited in amount, number, or extent <any quantity you desire> **b** : appreciably large or extended <could not endure it any length of time>

4 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

A common sense construction of Article III section 7, applicable the great mass of the people who are expected to read and understand it, is that it is applicable to "any" "matter relating to civil law" that is "relating to private rights" involving the "whole course of proceedings in a legal action" and that its application is "without restriction."

The ISTC's argument advanced by a deputy attorney general seeking to ignore "any" and interpret "civil process" as one word, a noun, and not as distinct words with common and understandable meanings is at best unsupportable. In this matter the deputy has taken an adversarial position that is unsupported by any formal Attorney General Opinion or case law. In challenging the operation of a specific Article of Idaho's Constitution, against a sitting member of the Idaho legislature, one would expect the deputy to take a more thorough and reasoned approach.

Also the argument advanced that Mr. Hart is "seeking to invoke the jurisdiction of this board and not defending himself from civil process" is similarly without merit. Mr. Hart without question is defending himself from the overreach of the Idaho State Tax Commission

(b). The deposit requirement was met.

Mr. Hart filed two checks totaling \$9,462.04 and his promise to pay the balance of the twenty percent, \$1,962.36. Mr. Hart's check for the balance was received and cashed by the ISTC. The affidavit of Shelly Sheridan submitted by the ISTC confirms these facts and the memorandum admits these facts. It is not disputed, nor is it even suggested, by ISTC that it, at any time or in any manner contacted Mr. Hart and informed him that his promise to pay was not "security acceptable to the tax commission." Idaho Code section 63-3049 (a). The ISTC by inaction waived any claim that the security was not acceptable to it and it is estopped to claim otherwise at this time. The ISCT is specifically granted by statute the discretion to accept "other type of security" in lieu of a cash deposit. Idaho Code section 63-3049. Whether estoppel exists against the government is tested generally by the same rules as those applicable to private persons. The government should not be permitted to utilize tactics that would not be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one. *Ware v. Idaho State Tax Commission*, 98 Idaho 477, 567 P. 2d 423 (1977). Equitable estoppel may be applied to prevent assertion of a statute of limitation if an actor's conduct caused the other party to refrain from some action

5 MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

during the limitation period. *Johnson v. McPhee*, 147 Idaho 455, 210 P. 3d 563 (Id. App. 2009) The ISTC's failure to promptly, or at anytime prior to its present motion, advise Mr. Hart, upon receipt of the checks and the promise to pay on March 31, 2010, that it did accept his promise to pay coupled with its cashing of the payment shortly thereafter clearly prejudices Mr. Hart if its belated argument is accepted. See *Zumwalt v. Stephan et. al.* 113 Idaho 822, 748 P. 2d 406 (Id. App. 1987).

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CLERK OF DISTRICT COURT

(c) The twenty percent deposit requirement violates Mr. Hart's constitutional and due process rights.

The 14th Amendment Section 1 to the United States Constitution specifically provides that "no state shall make or enforce any law which...shall deprive any person of...property, without due process of law." Any citizens right to challenge a state's attempt to take his property, especially a "tax" is protected by the 14th Amendment. See *Harper v. Virginia Board of Elections*, 865 S. Ct. 1079, 383 U.S. 663 (1966) The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779. Tying the right to challenge the state's attempt to deprive a citizen of his property and the opportunity to be heard is an unconstitutional violation of due process of law.

If the requirement of a twenty percent deposit was even arguably constitutional, such a requirement was implicitly repealed in 2009 by the Idaho legislature when it amended Idaho Code section 63-3004 which made the Internal Revenue Code of 1986 in effect on February 17, 2009 applicable for Idaho income tax purposes. U.S. Code section 7491 enacted on January 5, 2009 shifted the burden of proof from the taxpayer to the agency and provided the taxpayer with protection similar to "innocent until proven guilty" whereas the prior status of the law use to be "guilty until the taxpayer proves his innocence." Based upon this statutory change there is not even a "reasonable basis" to require a taxpayer, as a condition of challenging the Tax Commission's actions seeking to take property, to deposit any percentage of the disputed amount. The reasonable and rational approach is to require a "filing fee" just as in District Court or even before the federal Tax Court.

CONCLUSION

The Respondent ISTC's motion to dismiss should be denied.

DATED this 21st day of May, 2010.

Starr Kelso
Starr Kelso, Attorney for Appellant Mr. Hart

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CLERK OF DISTRICT COURT
IDAHO

CERTIFICATE OF SERVICE: I certify that a copy was mailed to William A. von Tagen attorney for Respondent, postage prepaid, at P.O. Box 36, Boise, Idaho 83722-10 on May 21, 2010 and that a copy was also faxed to him at 208-334-7844 on said date.

Starr Kelso
Starr Kelso

7 MEMORANDUM IN OPPPOSITION TO MOTION TO DISMISS

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

Attorney for the Idaho State Tax Commission

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,)	
)	
Appellant,	)	APPEAL NO. 10-B-1289
)	
-vs-	)	MOTION TO DISMISS
)	
IDAHO STATE TAX COMMISSION,)	
)	
Respondent.)	
)	

COMES NOW, the respondent, Idaho State Tax Commission, by and through its attorney, Deputy Attorney General William A. von Tagen, and respectfully moves this board for an Order dismissing the appeal of the Appellant, Philip L. Hart. This motion is based upon this board's lack of jurisdiction because of the failure of the Appellant to strictly comply with the provisions of Idaho Code § 63-3049 in that the Appellant did not perfect his appeal in a timely fashion in as much as a notice of appeal was not filed within the 91-day period set forth in Idaho Code § 63-3049 and that the Appellant did not post bond within the 91-day period set forth in that same Code section.

For the reasons set forth above, the Respondent respectfully asks this board to dismiss Appellant's appeal with prejudice.

MOTION TO DISMISS - 1

DATED this 15th day of April 2010.

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IDaho BOARD OF
TAX APPEALS


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of April 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L. HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

timely fashion. The Commission does not agree with the Appellant that the Idaho Constitution relieves the Appellant from filing an appeal in a timely fashion.

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IDAHO BOARD OF
TAX APPEALS

II.

ISSUES PRESENTED

A. Whether the Board of Tax Appeals has jurisdiction to review this case in the absence of the taxpayer timely perfecting an appeal of the Tax Commission's decision?

B. Whether taxpayer's status as a legislator relieves taxpayer of his obligation to perfect an appeal under Idaho Code § 63-3049?

III.

FACTS

As noted above, the Tax Commission issued a decision in this case on September 30, 2009. Taxpayer admits that he received a copy of this decision on October 2, 2009. On December 31, 2009, the taxpayer wrote a letter to Deputy Attorney General Erick Shaner stating that it was his intention to file an appeal following the close of the legislative session. In that letter, which is attached as an exhibit to the affidavit of Shelley Sheridan, taxpayer acknowledges that his appeal time would run on January 2, 2010, but asserted his belief that his status as a member of the Idaho Legislature relieves him of having to comply with the statute of limitations contained in Idaho Code § 63-3049.

The Appellant did nothing during the legislative session with respect to this appeal. The legislature adjourned on Monday, March 29, 2010. Two days later, on March 31, 2010, Appellant filed a Notice of Appeal with the Board of Tax Appeals and sent a copy to the Idaho State Tax Commission. Along with a copy sent to the Tax Commission, the Appellant sent the Commission two checks totaling \$9,462.04. The Appellant said he would send the remaining

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 2

amount by April 9, 2010. On April 13, 2010, the Tax Commission received a check from the Appellant in the amount of \$1,962.36. To date, the Appellant has paid a total of \$11,424.40 to the Tax Commission on his outstanding deficiency.

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IV.

IDAHO BOARD OF
TAX APPEALS

DISCUSSION

**THE BOARD OF TAX APPEALS LACKS JURISDICTION OVER A TAXPAYER'S
APPEAL UNLESS THE TAXPAYER STRICTLY COMPLIES WITH IDAHO
CODE § 63-3049 WHICH GOVERNS APPEALS FROM THE TAX COMMISSION TO
THE BOARD OF TAX APPEALS OR TO THE DISTRICT COURT.**

Idaho Code § 63-3811 governs appeals to the Board of Tax Appeals from a final determination of any tax liability. The Code section provides:

Taxpayers may, within the period herein provided and by following the procedures herein required, appeal to the Board of Tax Appeals for a final determination of any tax liability, including those pursuant to Idaho Code §§ 63-501, 63-511, and 63-3049.

Thus, while this appeal is pursuant to Idaho Code § 63-3811, it must comply with the provisions of Idaho Code § 63-3049. Idaho Code § 63-3049 provides that an appeal must be filed within 91 days of the receipt of notice of the decision of the Idaho State Tax Commission denying in whole or in part, any protest of the taxpayer. The taxpayer, by his own admission, acknowledges that 91 days expired on Saturday, January 2, 2010, thus the appeal should have been received by the Board of Tax Appeals by Monday, January 4, 2010. Unless the taxpayer complies with Idaho Code §§ 63-3811 and 63-3049, this board lacks jurisdiction.

The Idaho Supreme Court took up the issue of the jurisdiction to review appeals from the Tax Commission in Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 p.2d 313 (1999). That case involved an appeal of a Tax Commission decision by Ag Air. Although that case involved an appeal from the Tax Commission to the District Court, the rules are the same.

Regarding the jurisdictional requirement and the requirements of Idaho Code § 63-3049, the

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 3

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IDAHO BOARD OF
TAX APPEALS

Court held that the District Court did not acquire jurisdiction over the case until payment had been made to the Tax Commission. In this case, no payment was received within the 91-day time period. No payment whatsoever was received until it was mailed by the taxpayer on March 31, 2010. The entire 20 percent was not received until April 13, 2010. The taxpayer did not appeal in a timely fashion and did not pay 20 percent of the tax due in a timely fashion, and consequently, this board lacks jurisdiction.

TAXPAYER'S STATUS AS A LEGISLATOR DOES NOT RELIEVE HIM FROM THE OBLIGATION TO PERFECT HIS APPEAL AND THIS BOARD DOES NOT ACQUIRE JURISDICTION OVER TAXPAYER'S APPEAL EXCEPT WHEN IT IS PERFECTED IN A TIMELY FASHION.

In his letter of December 31, 2009, the taxpayer sets forth his belief that his status as a legislator allows him to defer the filing of his appeal until after the close of the legislative session. The session closed on March 29, 2010. Taxpayer cites as authority the Idaho Const. art. III, § 7 which provides:

Privileged from arrest. - Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature nor during the 10 days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place.

Apparently, it is the taxpayer's belief that the phrase "shall not be liable to any civil process" relieves him from the provisions of Idaho Code § 63-3049 which requires him to file his appeal within 91 days of the date he received his decision. Taxpayer recognizes that the appeal time would have run and that his appeal was due in the office of the Idaho Board of Tax Appeals not later than January 4, 2010. However, it is the taxpayer's contention that because the legislature went into session on January 11, 2010, that he was relieved from having to file his appeal by operation of Art. III, sec. 7.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 4**

Not being liable to any civil process does not mean that taxpayer is relieved from the operation of statutes of limitations such as those found in Idaho Code § 63-3049. In answering the taxpayer's contention, it is important first to determine a definition of "civil process."

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According to Webster's Dictionary, "civil process" is defined:

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civil process *n* : a writ or order of court in a civil action; *esp* : a writ for arrest in a civil proceeding

IDAHO BOARD OF
TAX APPEALS

Merriam-Webster Incorporated, Webster's 3rd New International Dictionary, principal copyright 1961, copyright 2002.

No civil process has been issued by this board or by the Tax Commission which conflicts with Art. III, sec. 7 of the Idaho Constitution. No summons has been issued, no subpoena served. The Tax Commission is not seeking contempt proceedings nor a warrant for civil arrest. Art. III, sec. 7 prohibits these things, but it does not stay the statute of limitations and excuse the Appellant from his obligation to file a timely appeal.

Arizona has a provision in its constitution similar to Art. III, sec. 7. The Arizona provision can be found at Art. IV, part 2, sec. 6 of the Arizona Constitution and provides:

Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and they shall not be subject to any civil process during the session of the legislature, nor for 15 days next before the commencement of each session.

This provision is substantively the same as Idaho's except that Arizona extends the privilege for 15 days prior to the session whereas Idaho's extends to only 10 days prior to the session. The Arizona Supreme Court had occasion to interpret this provision in Smith v. Arizona Citizens Clean Elections Commission, 212 Arizona 407, 132 p.3d 1187 (2006). The Arizona court noted that the purpose of the provision was to prevent either a criminal or civil arrest of a legislator that would prevent a legislator from attending the session. After noting the rationale, the court went on to hold:

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 5

That rationale does not pertain here. Smith is not defending a suit brought by another. Instead, Smith has invoked the jurisdictions of the courts. On January 24, 2006, for example, Smith filed a petition for review urging this court to accept jurisdiction and reverse the court of appeals memorandum decision, which has affirmed the superior courts judgment that Smith should forfeit his seat in the legislature.

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132 p.2d at 1190.

IDaho BOARD OF
TAX APPEALS

In this case, the taxpayer is seeking to invoke the jurisdiction of this board and is not defending himself from civil process. It is the taxpayer who is filing this action. In addition, civil process means a writ or order of a court in a civil action and, in particular, a writ for arrest in a civil proceeding. If the Tax Commission were seeking to enforce an administrative summons against Representative Hart or attempting to subpoena him in a judicial or administrative proceeding, then Art. III, sec. 7 of the Constitution would be pertinent. However, this is not what is happening. Representative Hart is arguing that Art. III, sec. 7 tolls the statute of limitations. I am aware of no case in which a court has held that a constitutional provision similar to Art. III, sec. 7 tolls the statute of limitations in a civil action or for an appeal from an administrative or judicial action.

It is also worth noting that in the Arizona case, the court noted that appeal times are jurisdictional. The court held on a related matter:

It is well settled that the time for filing an appeal, whether by appeal or by complaint for judicial review following the conclusion of the administrative process is jurisdictional. (Citations omitted.) The Commission has no power to waive it because the failure to timely appeal "deprive[s] th[e] court of jurisdiction to review the [administrative] decision.

132 p.3d at 1193.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS - 6

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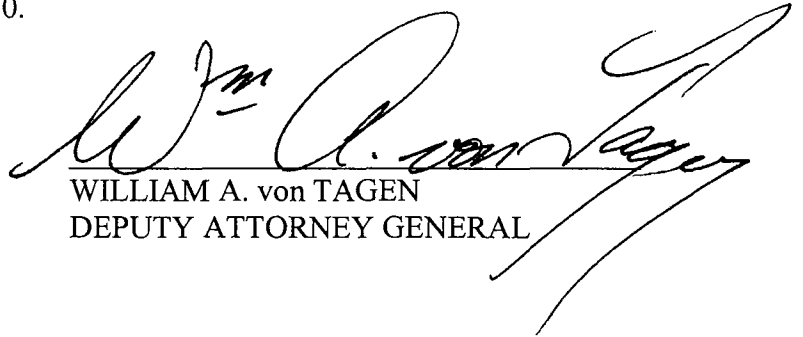
IDAH0 BOARD OF
TAX APPEALS

V.

CONCLUSION

The taxpayer, Phil Hart, is seeking to use his status as a legislator to relieve himself of having to comply with the statute of limitations set forth in Idaho Code § 63-3049. Representative Hart has misread Art. III, sec. 7, and in so misreading, has failed to comply with the mandatory provisions of Idaho Code § 63-3049. Consequently, this board is without jurisdiction to hear Representative Hart's appeal. The board has no alternative but to dismiss the appeal of the taxpayer, Phil Hart.

DATED this 15th day of April 2010.

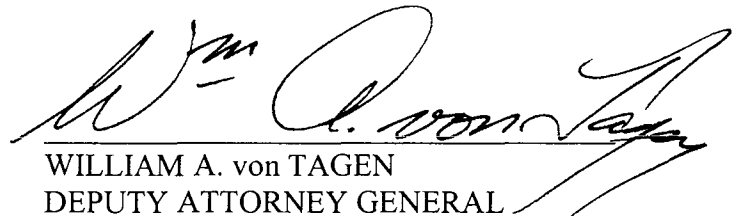


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of April 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 7

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)

PHILIP L. HART,)

Petitioner.)

DOCKET NOS. 21551 & 21552

DECISION

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IDAHO BOARD OF
TAX APPEALS

FACTUAL AND PROCEDURAL BACKGROUND

This is an individual income tax case. Based upon federal income tax information, the Income Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued two Notices of Deficiency Determination (NODs) to Philip L. Hart (Petitioner). Both NODs were dated September 4, 2008. One NOD covers taxable years 1996 through 1998 and references docket number 21551. The other NOD covers taxable years 1999 through 2004 and references docket number 21552. The federal information underlying the NODs in these matters was obtained from an IRS audit resulting in a final federal determination. The NODs advised the Petitioner that if he disagreed with the determination by the Bureau, he could petition the Commission for a redetermination of the NOD.¹

In response, the Petitioner protested the NODs. The Petitioner claimed at this time to have previously paid the 1999 through 2004 liabilities. The Petitioner also claimed the following for all the years in question: "There is no "Final Determination" or "Assessment" of, or liability for, any Federal Tax for the years detailed in the "Notice of Deficiency" and therefore there is no State Tax due or owing for those same years."

¹ The reader of this decision may wonder why two separate NODs were issued. Two separate NODs were issued because the Petitioner had never filed Idaho individual income tax returns for taxable years 1996 through 1998, however, for taxable years 1999 through 2004, a different set of circumstances had occurred. Petitioner filed actual returns and paid any taxes owed per those returns for taxable years 1999 through 2004. Federal information received by the Bureau showed Petitioner owed additional amounts for 1999 through 2004 and the NOD in docket number 21552 was issued to assert those deficiencies.

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IDHO BOARD OF

The Bureau mailed Petitioner a letter dated November 12, 2008, acknowledging that a protest had been received and that the matter was being transferred to the legal department of the Commission. The legal department sent a letter to the Petitioner dated December 17, 2008, acknowledging that a proper protest had been filed and requesting that the Petitioner indicate whether he wanted an informal hearing.

The Petitioner sent a letter dated January 15, 2009, requesting a hearing and that the hearing be delayed until thirty days after adjournment of the legislative session.² The Commission sent a letter dated February 5, 2009, allowing the hearing to be delayed no later than May 15, 2009. The Petitioner sent a letter to the Commission dated April 29, 2009, requesting again that the hearing be delayed and that within thirty days of the end of the legislative session he would contact the Commission and schedule a hearing. The Commission sent a letter dated May 6, 2009, wherein the Commission again agreed to delay the hearing, but that the hearing would be held within two weeks of the end of the legislative session. The legislative session ended May 8, 2009. The two week time period elapsed without the Petitioner contacting the Commission, however, Petitioner later sent a letter dated June 6, 2009, asking that the hearing be delayed again and providing a range of dates for a hearing between June 23 and July 10, 2009. The Commission again granted a delay to the hearing, which was scheduled and held on July 8, 2009. The Commission received further documentation from the Petitioner on July 7, 2009, as well as at the hearing, in support of his protest. During the hearing, the Petitioner agreed to provide the Commission with information regarding his appeals with the Internal Revenue Service by July 24, 2009.

The Commission sent a letter dated July 9, 2009, to the Petitioner reminding him of his agreement to supply the IRS appeal information by July 24, 2009. The Commission received a request from the Petitioner on July 13, 2009, in which the Petitioner requested copies of "all

² Petitioner is a member of the Idaho State Legislature, House of Representatives from District 3.

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SUPERINTENDENTS

documents that you used to arrive at both of the "Notice of Deficiency Determination"(s) dated September 4, 2008." The Commission copied those documents and provided them to the Petitioner in a letter dated July 21, 2009. The Commission received a phone call and fax on July 24, 2009, from a law firm in Spokane, Washington, in which a law firm paralegal indicated that one of its lawyers would be sending the Commission a letter in the following week regarding the Petitioner's tax matters. The law firm never sent the Commission any other correspondence, however, Petitioner provided the Commission with a letter that a Spokane, Washington law firm sent to Petitioner. This letter accompanied additional materials the Petitioner provided to the Commission on September 10, 2009, in support of his protest. The Commission has not received any further communications from the Petitioner or anyone else claiming to represent him. The Commission also has not as of the date of this decision received the IRS appeal information the Petitioner indicated he would provide. The Commission now issues this decision based upon the material currently in the file.

PROTESTED ISSUES AND ANALYSIS

Petitioner provides five arguments to support his protest. The first is an argument regarding serving civil process on a legislator. The second argument is the old and tired unapportioned direct tax argument. The third argument is in regard to whether Idaho may proceed with this matter when, according to the Petitioner, no assessment exists at the federal tax level. The fourth argument is that the Petitioner believes the income information provided to the Commission by the federal government is incorrect. The fifth, and last argument, is that the Idaho income tax does not conform to the uniformity requirements of Article VII, Section 5 of the Idaho Constitution. These arguments are addressed below.

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IDaho STATE OF

Serving of Civil Process and Federal Assessment

Petitioner alleges that the federal government issued a deficiency notice to him and demanded a response during the time he was serving in the 2008 Idaho legislature. Petitioner claims that he should be free from civil process during the time he is serving in the legislature according to Idaho Constitution, Article III, Section 7, which reads in pertinent part: "Senators and representatives in all cases . . . shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof . . ."

Petitioner believes these circumstances should somehow bar Idaho from proceeding on its NODs in these matters. The Bureau's NODs are at issue in this matter. What the federal government has done regarding the referenced constitutional timeframes in its enforcement of federal taxes is not at issue in this matter. Even assuming that Idaho Constitution, Article III, Section 7, may apply to administrative proceedings, the Commission has not required the Petitioner to engage in any process during the applicable constitutional timeframes and has in fact given substantial deference to Petitioner's legislative schedule.³

Petitioner also believes that because the federal government has not provided him a copy of his "assessment," that this should also bar Idaho from proceeding on its NODs in these matters.

Again, the Bureau's NODs are at issue in this matter. As stated above, the manner in which the federal government addresses its tax matters with Petitioner, insofar as these arguments are concerned, is irrelevant to a discussion regarding whether the Bureau's NODs are upheld.

³ The letter referenced above from the Spokane, Washington attorney addresses the legislative immunity issue. Even assuming that the IRS's actions that Petitioner claims took place during times when he should have had Idaho legislative immunity and that those actions were in regards to tax information upon which the Tax Commission based its NODs, the Tax Commission does not find the letter persuasive. The attorney is unable to cite any legal precedent that specifically addresses the application of Article III, Section 7, of the Idaho Constitution to IRS proceedings or Idaho tax administrative proceedings. The Petitioner also argues that Idaho's NODs are invalid because of the "fruit of the poisonous tree." The Commission assumes that Petitioner is making reference to law limiting the introduction of evidence if it is obtained illegally in criminal proceedings. The Commission does not find that the fruit of the poisonous tree doctrine has application in these civil administrative proceedings.

APR 15 2011

DEPARTMENT OF
TREASURYUnapportioned Direct Tax

Petitioner argues that the Bureau's NODs are based upon a federal tax and, therefore, do not conform to the taxation authority granted by the United States Constitution because it is an unapportioned direct tax.

State and federal courts have rejected this type of theme time and time again. In Coleman v. Commissioner of Internal Revenue, 791 F.2d 68 (C.A. 7 (Ind.) 1986), Judge Easterbrook penned:

Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead--so tax protesters think--to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.

The Petitioner asserts similar arguments as discussed by Judge Easterbrook. He believes his tax obligation has somehow been eliminated despite the fact that he lives in Idaho and earned a living in Idaho. Simply stated, the Petitioner's arguments are not supported by fact or law.

Idaho Code § 63-3002 provides what is taxable income as follows:

63-3002. Declaration of intent. It is the intent of the legislature by the adoption of this act, insofar as possible to make the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue Code relating to the measurement of taxable income, to the end that the taxable income reported each taxable year by a petitioner to the internal revenue service shall be the identical sum reported to this state, subject only to modifications contained in the Idaho law; to achieve this result by the application of the various provisions of the Federal Internal Revenue Code relating to the definition of income, exceptions therefrom, deductions (personal and otherwise), accounting methods, taxation of trusts, estates, partnerships and corporations, basis and other pertinent provisions to gross income as defined therein, resulting in an amount called "taxable income" in the Internal Revenue Code, and then to impose the provisions of this act thereon to derive a sum called "Idaho taxable income"; to impose a tax on residents of this state measured by Idaho taxable income wherever derived and on the Idaho taxable income of nonresidents which is the result of activity within or derived from sources within this state. All of the foregoing is subject to modifications in Idaho law including, without limitation, modifications

applicable to unitary groups of corporations, which include corporations incorporated outside the United States.

As incorporated into the Income Tax Act by Idaho Code § 63-3002, individuals are subject to Idaho income tax on their income from all sources, unless express federal or state exemptions, adjustments, or limitations apply. The Petitioner has not provided any information to establish that his income is exempt under the Internal Revenue Code or under any other law.

Petitioner has income and is required to file and pay taxes for the taxable years 1996 through 2004. Under our federalist system of government, the power to raise revenue to support the functioning of the government [i.e., the power to tax] is generally considered a concurrent state and federal power. The power of the states to tax the income of individuals was first established by the United States Supreme Court in Shaffer v. Carter, 252 U.S. 37, 50 (1920). In that case, Shaffer brought suit to enjoin the state of Oklahoma from collecting any tax assessed against him under the state's income tax law. Although Shaffer was a nonresident of Oklahoma, the Court found that the Oklahoma tax on his Oklahoma source income was constitutional. Justice Pitney, writing for the Court, stated:

In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses.

Justice Pitney went on to write:

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution.

APR 15 2010

IDAHO BOARD OF
TAX APPEALS

The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In McCulloch v. Maryland, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the federal government, Mr. Chief Justice Marshall, speaking for the court, conceded that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction saying: "It is obvious, that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation," etc.

In Michigan Central Railroad v. Powers, 201 U.S. 245, 292, 293, the court, by Mr. Justice Brewer, said: "We have had frequent occasion to consider questions of state taxation in the light of the federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods."

That a state may tax callings and occupations as well as persons and property has long been recognized.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business.*** It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Id. at 51-52. (Citations omitted.) See also, People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-13 (1937).

Federal Information

Here, the Petitioner argues that the information the Bureau obtained regarding his income from the federal government was incorrect. He argues that the federal government incorrectly calculated his income and that the Commission should not rely on this information.

However, Petitioner has failed to present any supporting records to support his assertions. Petitioner's argument, in this regard, will not receive further review from the Commission. The Commission does not infer that, even if it were to receive supporting documentation from

Petitioner, that the Commission would modify its NODs. The Petitioner carries the burden to prove that the Commission's NODs are incorrect.

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Article VII, Section 5

Lastly, the Petitioner believes that because the Idaho income tax is a graduated tax it fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution. The Petitioner weaves this argument using broken thread. The legislature in Idaho Code § 63-3002 states the intent to make "insofar as possible . . . the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue code . . . subject only to modifications contained in the Idaho law;" (emphasis added). The Petitioner fails to understand that the fabric of the Idaho income tax is Idaho law and not the Internal Revenue Code.⁴ The Internal Revenue Code may be used to provide guidance, but the Idaho income tax is woven by Idaho law using Idaho statutory thread. The Petitioner misreads Idaho Code § 63-3002. Idaho Code § 63-3002 only includes intent language. The Idaho income tax requirements are as set out in Idaho Code § 63-3022, and other applicable provisions of Idaho law. The final sentence in Idaho Code § 63-3002 also clearly states that, "All of the foregoing is subject to modifications in Idaho law . . ." In addition, the Idaho legislature specifically provided in Idaho Code § 63-3080 that the Idaho income tax is not a property tax. Therefore, as ruled by the Idaho Supreme Court in Diefendorf v. Gallet, 51 Idaho 619, 10 P.2d 307, (1932), the Idaho income tax act is not a property tax. The property tax uniformity provisions of Article VII, Section 5 of the Idaho Constitution that prohibit a graduated property tax are not applicable to the Idaho income tax.

CONCLUSION

It is well settled in Idaho that a Notice of Deficiency Determination issued by the Idaho State Commission is presumed to be correct. Albertson's Inc. v. State, Dept. of Revenue, 106

⁴ The Commission also finds that the case law Petitioner cites does not support his theory that the federal income tax is a property tax.

APR 15 2010

Idaho 810, 814 (1984); Parsons v. Idaho State Tax Commission, 110 Idaho 572, 574-575 fn.2 BOARD OF
APPEALS

(Ct. App. 1986). The burden is on the Petitioner to show that the tax deficiency is erroneous. Id.

Since the Petitioner has failed to meet this burden, the Commission finds that the amount shown due on the Notice of Deficiency Determination is true and correct.

The Bureau also added interest, which interest will continue to accrue pending payment of the tax liability pursuant to Idaho Code § 63-3045(6), and penalty to the Petitioner's tax deficiency. The Commission finds those additions appropriate as provided for in Idaho Code §§ 63-3045 and 63-3046.

WHEREFORE, the Notices of Deficiency Determination dated September 4, 2008, are hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the Petitioner pay the following tax, penalty, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1996	\$2,879	\$ 720	\$2,460	\$ 6,059
1997	8,387	2,097	6,429	16,913
1998	2,736	684	1,887	5,307
1999	2,281	570	1,406	4,257
2000	2,928	732	1,572	5,232
2001	3,680	920	1,692	6,292
2002	2,133	533	843	3,509
2003	1,683	421	576	2,680
2004	2,286	343	645	3,274
			<u>TOTAL</u>	<u>\$53,523</u>

Interest is calculated through October 15, 2009.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the Petitioner's right to appeal this decision is enclosed.

DATED this 30 day of September, 2009.

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APR 15 2010

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1227 CALS

IDAHO STATE TAX COMMISSION


COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of September, 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

PHILIP L. HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE, ID 83815

Receipt No 7008 1830 0004 0457 9455


Laurie J. Davies

APR 15 2010

IDAHO BOARD OF
TAX APPEALS

4) That attached hereto as Exhibit B is a copy of a letter dated March 30, 2010, in which was received by the Tax Commission on March 31, 2010, from the Appellant and which was accompanied by two checks; one in the amount of \$7,862.04 and another in the amount of \$1,600.00;

5) That attached hereto as Exhibit C is a copy of a letter dated April 9, 2010, from the Appellant. This letter was accompanied by a check in the amount of \$1,962.36 which, as the letter states, brought the total amount deposited with the Tax Commission to \$11,424.40;

6) That attached hereto as Exhibit D is a copy of a letter dated April 14, 2010, from Deputy Attorney General William A. von Tegen acknowledging receipt of the checks from the Appellant and informing the Appellant of Mr. von Tegen's intent to file a Motion to Dismiss;

7) That attached hereto as Exhibit E is a tracking and confirmation report from the US Postal Service showing that the decision of September 30, 2009, was received by the Appellant on October 2, 2009.


Further your Affiant sayeth not.

DATED this 15th day of April 2010.


SHELLEY SHERIDAN

SUBSCRIBED AND SWORN TO before me this 15th day of April 2010.




NOTARY PUBLIC FOR IDAHO
RESIDING IN Trampa, Idaho
MY COMMISSION EXPIRES: 3/31/2014

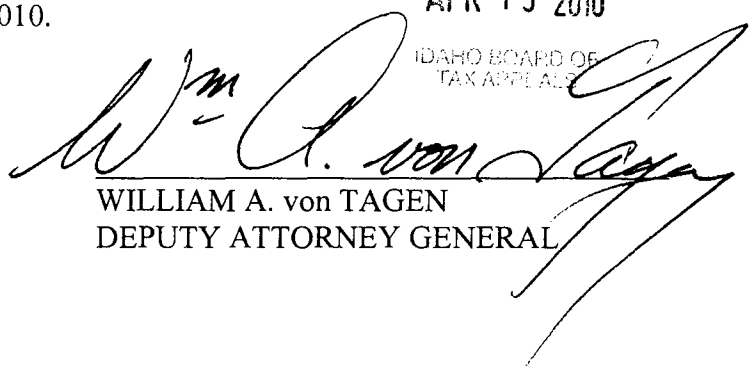
AFFIDAVIT OF SHELLEY SHERIDAN
IN SUPPORT OF MOTION TO DISMISS - 2

DATED this 15th day of April 2010.

RECEIVED

APR 15 2010

IDAHO BOARD OF
TAX APPEALS

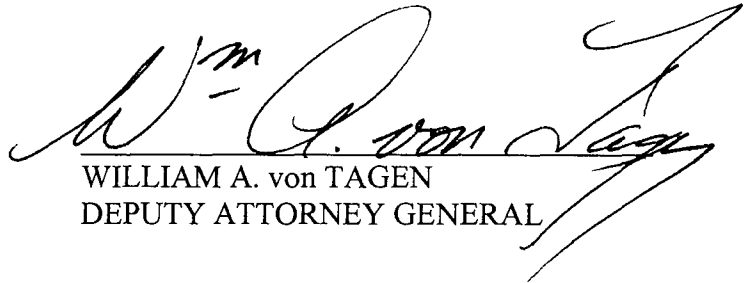


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of April 2010, served a copy of the within and foregoing AFFIDAVIT OF SHELLEY SHERIDAN IN SUPPORT OF MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L. HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

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JAN 04 2010

LEGAL SECTION
STATE TAX COMMISSION
BOISE, IDAHO

December 31, 2009

Mr. Erick M. Shaner
Deputy Attorney General
State Tax Commission
P. O. Box 36
Boise, Idaho 83722

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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

Dear Mr. Shaner:

This letter is in response to the Decision made by the Tax Commission which is dated September 30, 2009 for docket numbers 21551 and 21552. That Decision was mailed to me by way of certified mail, item number 7008 1830 0004 0457 9455.

It is my intention to appeal this Decision. The paper work included with the Decision noted that I have 91 days from the date I received this decision to make my appeal. According to Post Office records, this certified mail item was delivered on October 2, 2009. I have enclosed a document referencing that with this letter. As I count the days, the 91 days appeal period runs through January 2, 2010.

However, as a member of the legislature, I can defer filing an appeal and all the work that that entails while the legislature is in session and ten days prior to the beginning of the session. Please refer to Article III, Section 7 of the Idaho Constitution. Since the 2010 session of the Legislature is scheduled to begin on January 11, 2010, the immunity period backs up to today, December 31, 2009 as January 1, 2010 is a holiday.

Consequently, it is my intention to submit my appeal immediately upon adjournment of the 2010 session of the Legislature.

Sincerely,


Philip Hart

Exhibit

Notice of Appeal to the Board of Tax Appeals

March 30, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

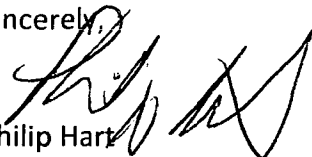
Dear State Tax Commission:

Please find enclosed a deposit of \$7,862.04 and \$1,600.00 to cover the twenty percent cash deposit required by Idaho Code 63-3049 (b). The amount of the alleged deficiency for these two docket numbers is \$27,609 plus \$24,518. Twenty percent of this amount is \$11,424.40.

Please consider this letter my promise to pay the remaining \$1,962.36. I am a member of the Legislature and have been in Boise since early January, except for weekends. I need to return home to the Coeur d'Alene area and be there during business hours in order to send the remaining \$1,962.36 to your office. The Legislature adjourned yesterday, and I expect to be back home by the end of this week. By April 9th I can have a check in the mail to your office for the remaining \$1,962.36.

The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the State Tax Commission

Sincerely,


Philip Hart

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MAR 31 2010

LEGAL SECTION
STATE TAX COMMISSION
BOISE, IDAHO

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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

Notice of Appeal to the Board of Tax Appeals

April 9, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

Dear State Tax Commission:

Please find enclosed a deposit check of \$1,962.36 which will bring the total amount deposited for the appeal of the above docket numbers to \$11,424.40.

Please send a receipt for the enclosed check, and for the \$7,862.04 and \$1,600.00 checks that I sent to your office last week. You may send the receipts to my above address.

Sincerely,


Philip Hart

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APR 13 2010

LEGAL SECTION
STATE TAX COMMISSION
BOISE, IDAHO

Exhibit



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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WARDEN

April 14, 2010

The Honorable
Philip L. Hart
2900 Government Way #262
Coeur d'Alene, ID 83815

Re: Docket 21551

Dear Representative Hart:

We have received your payment of \$1962.36 for the remaining 20% required to file an appeal. As requested, I've enclosed copies of the receipts for your payments of \$1,600.00, \$7,862.04, and \$1,962.36 for a total of \$11,424.40.

I have been trying to contact you to inform you that I will be filing a Motion to Dismiss based upon failure to file a timely appeal.

Please do not hesitate to call if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. von Tegen".

William A. von Tegen
Deputy Attorney General
(208) 334-7544

wat/ss
Enclosures



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APR 15 2010

IDAHO BOARD OF

[Home](#) | [Help](#) | [Sign In](#)[Track & Confirm](#)[FAQs](#)

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Search Results

Label/Receipt Number: 7008 1830 0004 0457 9455

Service(s): Certified Mail™

Status: Delivered

Your item was delivered at 11:47 AM on October 2, 2009 in COEUR D
ALENE, ID 83815.[Track & Confirm](#)

Enter Label/Receipt Number.

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Exhibit

E

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

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IDAHO BOARD OF
TAX APPEALS

Attorney for the Idaho State Tax Commission

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,)	
)	
Appellant,	)	APPEAL NO. 10-B-1289
)	
-vs-	)	AFFIDAVIT OF KRISTINE GAMBEE
	)	IN SUPPORT OF MOTION TO DISMISS
IDAHO STATE TAX COMMISSION,)	
)	
Respondent.)	
)	

STATE OF IDAHO)
) ss
COUNTY OF ADA)

COMES NOW, Kristine Gambee, and after first being duly sworn, deposes and says:

- 1) That the information contained herein is of your affiant's own personal knowledge;
- 2) That your affiant is bureau chief of the Idaho State Tax Commission's Field Services, and in that capacity has examined the records of the Commission in regard to the Appellant herein;
- 3) That the records of the Idaho State Tax Commission indicate that the Commission issued its decision regarding the Appellant on September 30, 2009;
- 4) The Commission's records further establish that no payment was received by the Commission in this case until March 31, 2010. On that date, the Commission received two

AFFIDAVIT OF KRISTINE GAMBEE
IN SUPPORT OF MOTION TO DISMISS - 1

APR 15 2010

IDAHO BOARD OF
TAX APPEALS

checks, one for \$7,862.04 and a second one for \$1,600.00. The total amount received by the Commission on March 31, 2010, was \$9,462.04;

5) The records of the Commission further show that a third check was received relating to this appeal on April 13, 2010, in the amount of \$1,962.36. This brings the total amount that the Appellant has paid in this matter to \$11,424.40;

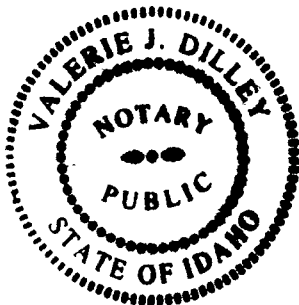
6) The records of the Tax Commission establish that no other checks or payments were received from the Appellant relating to this matter other than those detailed above.

Further your Affiant sayeth not.

DATED this 15th day of April 2010.

Kristine Gambée
KRISTINE GAMBEE

SUBSCRIBED AND SWORN TO before me this 15th day of April 2010.



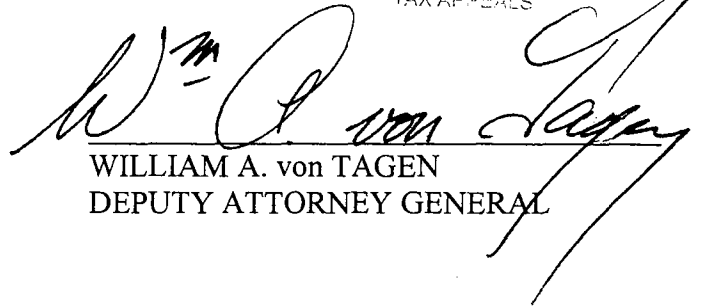
Valerie J. Dilley
NOTARY PUBLIC FOR IDAHO
RESIDING IN Hampton, Idaho
MY COMMISSION EXPIRES: 3/31/2014

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APR 15 2010

DATED this 15th day of April 2010.

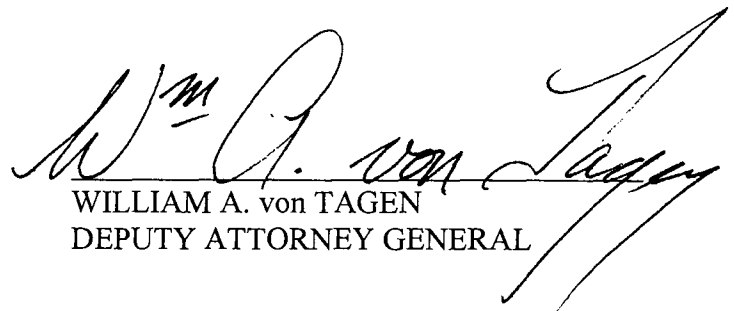
IDaho BOARD OF
TAX APPEALS


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of April 2010, served a copy of the within and foregoing AFFIDAVIT OF KRISTINE GAMBEE IN SUPPORT OF MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL



STATE OF IDAHO

(208) 334-3354
FAX 334-4060

BOARD OF TAX APPEALS

Office Address: Suite 110
3380 Americana Terrace
Boise, Idaho 83706
Mailing Address: P.O. Box 83720
Boise, Idaho 83720-0088

April 5, 2010

Philip Hart
2900 Government Way #262
Coeur d'Alene ID 83815

Re: **Appeal No. 10-B-1289**
Docket Nos. 21551 and 21552

Dear Philip Hart:

This letter will acknowledge receipt of an appeal filed on March 31, 2010, from the decision of the Idaho State Tax Commission.

As per Idaho Code § 63-3049, an appeal may be filed with this Board within ninety-one (91) days after the receipt of notice of the Decision of the State Tax Commission. Subsection (b) of the statute, requires that twenty percent (20%) of the amount asserted must be deposited with the tax commission before a taxpayer may seek review with this Board.

The Board can not determine whether your appeal has been perfected.

Please provide the following information within 14 days, or by **April 19, 2010**, otherwise the appeal may be dismissed.

1. Proof that both the filing requirement and twenty percent (20%) pre-pay requirement were met within the statutory ninety-one (91) days. (Idaho Code § 63-3049)
2. Please provide the date of receipt and a copy of the Tax Commission Decision you are appealing.
3. A statement of the amount in dispute.

63-3049. JUDICIAL REVIEW. (a) Redetermination by the state tax commission may be reviewed in the district court for Ada county or the county in which the taxpayer resides or has his principal office or place of business by a complaint filed by the taxpayer against the state tax commission within ninety-one (91) days after the receipt of notice of the

decision of the state tax commission denying, in whole or in part, any protest of the taxpayer or, within the same period, by filing an appeal with the board of tax appeals. Upon the serving of summons upon the state tax commission the case shall proceed as other civil cases but may be heard by the judge in chambers. If the case is appealed to the board of tax appeals, the hearing before that body shall proceed as set forth in the act creating such board. If the court finds that any tax is due, it shall enter judgment for such tax, including any interest or penalties that may also be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment. In the case of sales or use tax and corporate income tax decisions by the state tax commission, when the amount asserted exceeds twenty-five thousand dollars (\$25,000), no appeal to the board of tax appeals shall be allowed.

(b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

No act, order or proceeding of the tax commission shall be valid until after the time allowed for taking such court action has expired or such court action is finally determined. As used in this section, the term "amount asserted" shall mean the total amount due, as set forth in the decision of the state tax commission.

Enclosed is information regarding the Board's statutes and rules, Suggestions for Appearance, and three brochures.

When the appeal has been perfected, a hearing will be scheduled within 90 days of the date of this letter. All parties will be notified in writing of the date, time and place of the hearing. If you have any questions, please contact this office.

Sincerely,



Susan Renfro
Director and Clerk to the Board

Enclosures

cc: Idaho State Tax Commission

Visit our web site at www.bta.idaho.gov

Notice of Appeal to the Board of Tax Appeals

April 9, 2010

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APR 12 2010

IDAHO BOARD OF
TAX APPEALS

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

Dear State Tax Commission:

Please find enclosed a deposit check of \$1,962.36 which will bring the total amount deposited for the appeal of the above docket numbers to \$11,424.40.

Please send a receipt for the enclosed check, and for the \$7,862.04 and \$1,600.00 checks that I sent to your office last week. You may send the receipts to my above address.

Sincerely,


Philip Hart

PHILIP L. HART
c/o 2900 GOVERNMENT WAY, #262
COEUR D'ALENE, ID 83815

4402
92-373/1231

DATE April 9 10

PAY
TO THE
ORDER OF

State of Idaho

\$ 1962.36

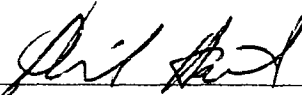
Nineteen hundred sixty two & 36/100

DOLLARS

IDAHO INDEPENDENT BANK
912 NORTHWEST BOULEVARD
COEUR D'ALENE, IDAHO 83814

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FOR



MP

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SAFETY

Hart
2900 Government Way #262
Coeur d'Alene, Idaho 83815

SPOKANE WA 990

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Join Us Now And It Back

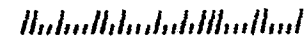


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IDAHO BOARD OF
TAX APPEALS

Board of Tax Appeals
P.O. Box 83720
Boise Idaho 83720



Notice of Appeal to the Idaho Board of Tax Appeals

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APR 01 2010

IDAHO BOARD OF
TAX APPEALS

Date: March 31, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815
Voice (208) 772-2522

To: Idaho Board of Tax Appeals
3380 Americana Terrace, Suite 110
P. O. Box 83720
Boise, Idaho 83720-0088

Re: Notice of Appeal from Decision of the Tax Commission of the State of Idaho dated September 30, 2009, Docket Numbers: 21551 and 21552. A copy of the Decision is included.

Tax years being appealed: 1996, 1997, 1998, 2000, 2001, 2002, 2003 and 2004.

Now comes Philip Hart with this Appeal of a Decision of the State Tax Commission concerning docket numbers 21551 and 21552. This appeal is being filed on the ninetieth day from the receipt of the decision as the Decision was sent to the Appellant by way of certified mail and received on October 2, 2009. The Appellant is a member of the Idaho Legislature and the 91 days for which the Appellant has to respond was tolled by the for the duration of the 2010 legislative session which ended March 29, 2010. Please see the Idaho Constitution at Article III, section 7.

The Idaho Board of Tax Appeals has jurisdiction in accordance with Idaho Code 63-3049 as this is an appeal from a Decision of the State Tax Commission.

The issues for which Hart appeals are as follows:

Objection #1. The Idaho State Tax Commission's Notice of Deficiency Determination appears to be based on a federal Notice of Deficiency that was dated January 2, 2008. This federal Notice of Deficiency mandated a response date of April 1, 2008. This entire period of time fell within a period of time prohibited by the Idaho Constitution from serving Petitioner with a civil process.

The federal Notice of Deficiency was dated January 2, 2008 and pertained to years 1997, 1998, 1999, 2000, 2001, 2002 and 2003. The last day to file a petition with the United States Tax Court was April 1, 2008. The serving of this Notice of Deficiency and the requirement to

APR 01 2010

IDAHO BOARD OF
TAX APPEALS

petition tax court constitutes a "civil process" and is barred from being imposed on Mr. Hart during this time period as Mr. Hart is a member of Legislature and the constitutional provision found at Article III, section 8 applies which reads,

"Senators and representatives in all cases..., and shall not be liable to any civil process during the session of the legislature, or during the ten days next before the commencement thereof."

The 2008 session of the Legislature convened on January 7, 2008 and did not adjourn until April 2, 2008. The timing of the 2008 federal Notice of Deficiency fell wholly within this time period prohibited by the Idaho Constitution.

On August 25, 2006 an employee of the Internal Revenue Service handed Mr. Hart a summons as Mr. Hart walked into the House of Representatives chambers for the special session of the Legislature on that same date. I objected to that service of civil papers and the IRS re-served me on November 9, 2006 at their office in Coeur d'Alene, Idaho. The fact that the IRS re-served me this summons is evidence that the immunity provision found in the Idaho Constitution is effective. Exhibits will be provided.

On April 1, 2008 I also objected to the Notice of Deficiency dated January 2, 2008 by sending letters to the IRS in Denver, Colorado; Boise, Idaho; and Idaho Falls, Idaho. A written legal analysis of this argument will be provided by an Idaho licensed attorney.

Objection #2. The tax that the Idaho Notice of Deficiency Determination is attempting to collect is based entirely on a federal tax as defined by Title 26 of the United States Code. (See State Tax Commission Docket Numbers 21551 and 21552.) Taxes authorized by the United States Constitution include only apportioned direct taxes and uniform indirect taxes.

Therefore, since the Idaho tax piggybacks onto the federal tax, this tax must conform to the taxation authority of the Constitution of the United States of America. The tax in question is an unapportioned direct tax. The United States Supreme Court has ruled that there is no exemption to the apportionment requirement for direct taxes. Hence the tax has not been assessed by the federal government.

Objection #3. There is no assessment by the federal government for the collection of the tax for any of the years in question. A tax can not be collected unless it is first assessed.

I have made several attempts to obtain copies of the federal assessments made for taxes that I allegedly owe. The federal regulations are absolutely clear, there must be an assessment before a tax is due. And the taxpayer has a right to obtain a copy of this assessment.

26 CFR § 301.6203-1 Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment

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officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. **If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy** of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

Freedom of Information Act requests to the IRS for Individual Master File records, Substitute for Return records, IRS Form 13496, IRS Form 4549, IRS Form 886-A and any assessment records of any kind have not yielded any documents substantiating that an assessment has been made for the federal tax for the years in question. Further evidence of this claim will be provided.

As such, what can not be taxed because of the fundamental law must therefore be exempt. Section 83 of the Internal Revenue Code allows for this exemption.

"The plain language of section 83(a) belies Alves's argument. The statute applies to all property transferred in connection with the performance of services. No reference is made to the term "compensation." Nor is there any statutory requirement that the property have a fair market value in excess of the amount paid at the time of the transfer. Indeed, if Congress intended section 83(a) to apply solely to restricted stock used to compensate employees, it could have used much narrower language. Instead, Congress made section 83(a) applicable to all restricted "property," not just stock; to property transferred to "any person," not just to employees; and to property transferred "in connection with ...services" not just compensation for employment." Alves v. C.I.R., 734 F.2d 478 (1984).

Objection #4. The Idaho State Tax Commission's Notice of Deficiency Determination appears to be based on a federal Notice of Deficiency that was dated January 2, 2008. This federal Notice of Deficiency is based on an Examination Report dated October 16, 2007. This Examination Report contains multiple errors of such magnitude that the entire report should be impeached.

The examiner's report covers the years 1997 thru 2004, and is full of errors. For each of these years, the examiner asked me to re-file the returns, which I did. At one point all the returns were lost, and I had to file the original return twice. The examiner asked me to re-file because I had aggregated the revenue I received from engineering services and book sales. She wanted to separate the engineering services revenue from the book sales revenue as well as separate the related expenses. I did this and filed 1040X returns as requested.

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In the examination report, it appears that the examiner recognized the new 1040X figures for Schedule C expenses as the new expense figure was greater than the original expense figure. As such, the examiner allowed a greater deduction for the difference. Then the examiner added back as "income" the original Schedule C deduction plus the updated Schedule C deduction!!! The effect was to deny all deductions for all the years examined, even though I had supplied the examiner with over two bankers boxes full of documents and had spent 4 days with her in a personal interview.

As an example, I will address the years 1997 and 1998. The following were the revenue and expense figures I reported to the IRS in the returns for those years.

In 1997, working as an engineer I received payments for engineering services in the amount of \$128,145. Expenses that were incurred in generating this revenue from engineering services included payments to a subcontracting engineer of \$55,871, it included vehicle expenses of \$4,012, professional services of \$955, travel expenses of \$6,909, utility expenses of \$6,386, rent of \$2,600, bank charges of \$406 and office expenses of \$10,661. The total expenses were \$87,566. This yields a net revenue of \$40,558 before any exemptions, standard deductions or credits. Yet the examination report claims that the net revenue requires an upward adjustment of \$84,768 more than what I reported with no justifiable explanation.

In 1998, continuing to work as an engineer I received payments for engineering services in the amount of \$64,711. Expenses that were incurred in generating this revenue for engineering services included vehicle expenses of \$2,793, professional services of \$2,123, travel expense of \$9,370, utility expense of \$313, expenses related to the writing and publishing of a book of \$6,250, and office expenses of \$14,378. The total expenses were \$36,227. This yields a net revenue of \$28,484 before any exemptions, standard deductions or credits. Yet the examination report claims that the net revenue requires an upward adjustment of \$29,168 more than what I reported with no justifiable explanation.

An analysis of the IRS examination report by a forensic accountant will be provided showing the repeated errors made by the IRS in preparation of their report.

Objection #5. The current Idaho income tax is not the same tax that the Idaho Supreme Court had rendered an opinion on in 1932 with their *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932). That tax was not married to, nor piggybacked onto the federal income tax.

Today there is no question that the Idaho state income tax is premised upon and directly connected to the federal income tax. This is perfectly clear just simply from an examination of Idaho Code §§ 63-3002 and 63-3004. Further, §63-3030 imposes a requirement to file a state income tax return upon the very same class of individuals who are required to file federal income tax returns under 26 U.S.C., §6012. Apparently, those who are required to file federal income tax returns must also file Idaho income tax returns if they are residents of Idaho.

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The current Idaho state income tax laws are "piggybacked" upon the similar federal income tax laws and thus it is essential to briefly mention the constitutional foundation for those laws, and compare them to the constitutional restraints applicable to state taxes. The federal government has two great powers of taxation: it may impose direct taxes, but those taxes must be apportioned. It may likewise impose indirect taxes, but those taxes must be uniform; see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895); and *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 36 S.Ct. 236 (1916).

A different and perhaps almost opposite rule prevails within the states and especially Idaho. Via Idaho Constitution Art. 7, §5, direct property taxes must be uniform, which is the rule applicable to indirect taxes at the federal level. Because these rules for taxation are different and even antagonistic between the federal government and the states, serious problems will undoubtedly arise whenever any attempt is made to connect some state taxes to a particular federal tax. If Congress imposes a direct federal tax via apportionment, a state tax tied to this federal one would be in serious doubt if the state rule for the imposition of a direct property tax was that it be uniform. Herein lies the problem for the Idaho state income tax laws. The deciding factor is whether §63-3080 is constitutional under the current tax scheme which connects the state tax to the federal. A more full analysis of this argument will be provided.

For all the reasons stated above, the State Tax Commission should withdraw their September 4, 2008 Notice of Deficiency Determination. Appellee will provide additional argument, exhibits and reports to substantiate the above claims.

Signed:

Philip Hart

date

Proof of Service

I hereby certify that today, March 31, 2010, I served the forgoing Notice of Appeal on the State Tax Commission by way of first class mail, postage prepaid.

Philip Hart March 31 2010
Philip Hart date

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IDAHO BOARD OF
TAX APPEALS

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

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IDAHO BOARD OF
TAX APPEALS

In the Matter of the Protest of)

PHILIP L. HART,)

Petitioner.)

DOCKET NOS. 21551 & 21552

DECISION

FACTUAL AND PROCEDURAL BACKGROUND

This is an individual income tax case. Based upon federal income tax information, the Income Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued two Notices of Deficiency Determination (NODs) to Philip L. Hart (Petitioner). Both NODs were dated September 4, 2008. One NOD covers taxable years 1996 through 1998 and references docket number 21551. The other NOD covers taxable years 1999 through 2004 and references docket number 21552. The federal information underlying the NODs in these matters was obtained from an IRS audit resulting in a final federal determination. The NODs advised the Petitioner that if he disagreed with the determination by the Bureau, he could petition the Commission for a redetermination of the NOD.¹

In response, the Petitioner protested the NODs. The Petitioner claimed at this time to have previously paid the 1999 through 2004 liabilities. The Petitioner also claimed the following for all the years in question: "There is no "Final Determination" or "Assessment" of, or liability for, any Federal Tax for the years detailed in the "Notice of Deficiency" and therefore there is no State Tax due or owing for those same years."

¹ The reader of this decision may wonder why two separate NODs were issued. Two separate NODs were issued because the Petitioner had never filed Idaho individual income tax returns for taxable years 1996 through 1998, however, for taxable years 1999 through 2004, a different set of circumstances had occurred. Petitioner filed actual returns and paid any taxes owed per those returns for taxable years 1999 through 2004. Federal information received by the Bureau showed Petitioner owed additional amounts for 1999 through 2004 and the NOD in docket number 21552 was issued to assert those deficiencies.

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TAX APPEALS

The Bureau mailed Petitioner a letter dated November 12, 2008, acknowledging that a protest had been received and that the matter was being transferred to the legal department of the Commission. The legal department sent a letter to the Petitioner dated December 17, 2008, acknowledging that a proper protest had been filed and requesting that the Petitioner indicate whether he wanted an informal hearing.

The Petitioner sent a letter dated January 15, 2009, requesting a hearing and that the hearing be delayed until thirty days after adjournment of the legislative session.² The Commission sent a letter dated February 5, 2009, allowing the hearing to be delayed no later than May 15, 2009. The Petitioner sent a letter to the Commission dated April 29, 2009, requesting again that the hearing be delayed and that within thirty days of the end of the legislative session he would contact the Commission and schedule a hearing. The Commission sent a letter dated May 6, 2009, wherein the Commission again agreed to delay the hearing, but that the hearing would be held within two weeks of the end of the legislative session. The legislative session ended May 8, 2009. The two week time period elapsed without the Petitioner contacting the Commission, however, Petitioner later sent a letter dated June 6, 2009, asking that the hearing be delayed again and providing a range of dates for a hearing between June 23 and July 10, 2009. The Commission again granted a delay to the hearing, which was scheduled and held on July 8, 2009. The Commission received further documentation from the Petitioner on July 7, 2009, as well as at the hearing, in support of his protest. During the hearing, the Petitioner agreed to provide the Commission with information regarding his appeals with the Internal Revenue Service by July 24, 2009.

The Commission sent a letter dated July 9, 2009, to the Petitioner reminding him of his agreement to supply the IRS appeal information by July 24, 2009. The Commission received a request from the Petitioner on July 13, 2009, in which the Petitioner requested copies of "all

² Petitioner is a member of the Idaho State Legislature, House of Representatives from District 3.

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documents that you used to arrive at both of the "Notice of Deficiency Determination" (S) dated September 4, 2008." The Commission copied those documents and provided them to the Petitioner in a letter dated July 21, 2009. The Commission received a phone call and fax on July 24, 2009, from a law firm in Spokane, Washington, in which a law firm paralegal indicated that one of its lawyers would be sending the Commission a letter in the following week regarding the Petitioner's tax matters. The law firm never sent the Commission any other correspondence, however, Petitioner provided the Commission with a letter that a Spokane, Washington law firm sent to Petitioner. This letter accompanied additional materials the Petitioner provided to the Commission on September 10, 2009, in support of his protest. The Commission has not received any further communications from the Petitioner or anyone else claiming to represent him. The Commission also has not as of the date of this decision received the IRS appeal information the Petitioner indicated he would provide. The Commission now issues this decision based upon the material currently in the file.

PROTESTED ISSUES AND ANALYSIS

Petitioner provides five arguments to support his protest. The first is an argument regarding serving civil process on a legislator. The second argument is the old and tired unapportioned direct tax argument. The third argument is in regard to whether Idaho may proceed with this matter when, according to the Petitioner, no assessment exists at the federal tax level. The fourth argument is that the Petitioner believes the income information provided to the Commission by the federal government is incorrect. The fifth, and last argument, is that the Idaho income tax does not conform to the uniformity requirements of Article VII, Section 5 of the Idaho Constitution. These arguments are addressed below.

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IDAHO BOARD OF
TAX APPEALSServing of Civil Process and Federal Assessment

Petitioner alleges that the federal government issued a deficiency notice to him and demanded a response during the time he was serving in the 2008 Idaho legislature. Petitioner claims that he should be free from civil process during the time he is serving in the legislature according to Idaho Constitution, Article III, Section 7, which reads in pertinent part: "Senators and representatives in all cases . . . shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof . . ."

Petitioner believes these circumstances should somehow bar Idaho from proceeding on its NODs in these matters. The Bureau's NODs are at issue in this matter. What the federal government has done regarding the referenced constitutional timeframes in its enforcement of federal taxes is not at issue in this matter. Even assuming that Idaho Constitution, Article III, Section 7, may apply to administrative proceedings, the Commission has not required the Petitioner to engage in any process during the applicable constitutional timeframes and has in fact given substantial deference to Petitioner's legislative schedule.³

Petitioner also believes that because the federal government has not provided him a copy of his "assessment," that this should also bar Idaho from proceeding on its NODs in these matters.

Again, the Bureau's NODs are at issue in this matter. As stated above, the manner in which the federal government addresses its tax matters with Petitioner, insofar as these arguments are concerned, is irrelevant to a discussion regarding whether the Bureau's NODs are upheld.

³ The letter referenced above from the Spokane, Washington attorney addresses the legislative immunity issue. Even assuming that the IRS's actions that Petitioner claims took place during times when he should have had Idaho legislative immunity and that those actions were in regards to tax information upon which the Tax Commission based its NODs, the Tax Commission does not find the letter persuasive. The attorney is unable to cite any legal precedent that specifically addresses the application of Article III, Section 7, of the Idaho Constitution to IRS proceedings or Idaho tax administrative proceedings. The Petitioner also argues that Idaho's NODs are invalid because of the "fruit of the poisonous tree." The Commission assumes that Petitioner is making reference to law limiting the introduction of evidence if it is obtained illegally in criminal proceedings. The Commission does not find that the fruit of the poisonous tree doctrine has application in these civil administrative proceedings.

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IDAHO BOARD OF
TAX APPEALSUnapportioned Direct Tax

Petitioner argues that the Bureau's NODs are based upon a federal tax and, therefore, do not conform to the taxation authority granted by the United States Constitution because it is an unapportioned direct tax.

State and federal courts have rejected this type of theme time and time again. In Coleman v. Commissioner of Internal Revenue, 791 F.2d 68 (C.A. 7 (Ind.) 1986), Judge Easterbrook penned:

Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. "Tax protesters" have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead--so tax protesters think--to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.

The Petitioner asserts similar arguments as discussed by Judge Easterbrook. He believes his tax obligation has somehow been eliminated despite the fact that he lives in Idaho and earned a living in Idaho. Simply stated, the Petitioner's arguments are not supported by fact or law.

Idaho Code § 63-3002 provides what is taxable income as follows:

63-3002. Declaration of intent. It is the intent of the legislature by the adoption of this act, insofar as possible to make the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue Code relating to the measurement of taxable income, to the end that the taxable income reported each taxable year by a petitioner to the internal revenue service shall be the identical sum reported to this state, subject only to modifications contained in the Idaho law; to achieve this result by the application of the various provisions of the Federal Internal Revenue Code relating to the definition of income, exceptions therefrom, deductions (personal and otherwise), accounting methods, taxation of trusts, estates, partnerships and corporations, basis and other pertinent provisions to gross income as defined therein, resulting in an amount called "taxable income" in the Internal Revenue Code, and then to impose the provisions of this act thereon to derive a sum called "Idaho taxable income"; to impose a tax on residents of this state measured by Idaho taxable income wherever derived and on the Idaho taxable income of nonresidents which is the result of activity within or derived from sources within this state. All of the foregoing is subject to modifications in Idaho law including, without limitation, modifications

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applicable to unitary groups of corporations, which include corporations incorporated outside the United States.

IDAHO BOARD OF
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As incorporated into the Income Tax Act by Idaho Code § 63-3002, individuals are subject to Idaho income tax on their income from all sources, unless express federal or state exemptions, adjustments, or limitations apply. The Petitioner has not provided any information to establish that his income is exempt under the Internal Revenue Code or under any other law.

Petitioner has income and is required to file and pay taxes for the taxable years 1996 through 2004. Under our federalist system of government, the power to raise revenue to support the functioning of the government [i.e., the power to tax] is generally considered a concurrent state and federal power. The power of the states to tax the income of individuals was first established by the United States Supreme Court in Shaffer v. Carter, 252 U.S. 37, 50 (1920). In that case, Shaffer brought suit to enjoin the state of Oklahoma from collecting any tax assessed against him under the state's income tax law. Although Shaffer was a nonresident of Oklahoma, the Court found that the Oklahoma tax on his Oklahoma source income was constitutional. Justice Pitney, writing for the Court, stated:

In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses.

Justice Pitney went on to write:

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution.

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TAX APPEALS

The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In McCulloch v. Maryland, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the federal government, Mr. Chief Justice Marshall, speaking for the court, conceded that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction saying: "It is obvious, that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation," etc.

In Michigan Central Railroad v. Powers, 201 U.S. 245, 292, 293, the court, by Mr. Justice Brewer, said: "We have had frequent occasion to consider questions of state taxation in the light of the federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods."

That a state may tax callings and occupations as well as persons and property has long been recognized.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business.*** It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Id. at 51-52. (Citations omitted.) See also, People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-13 (1937).

Federal Information

Here, the Petitioner argues that the information the Bureau obtained regarding his income from the federal government was incorrect. He argues that the federal government incorrectly calculated his income and that the Commission should not rely on this information.

However, Petitioner has failed to present any supporting records to support his assertions. Petitioner's argument, in this regard, will not receive further review from the Commission. The Commission does not infer that, even if it were to receive supporting documentation from

Petitioner, that the Commission would modify its NODs. The Petitioner carries the burden to prove that the Commission's NODs are incorrect.

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Article VII, Section 5

IDAHO BOARD OF
TAX APPEALS

Lastly, the Petitioner believes that because the Idaho income tax is a graduated tax it fails the uniformity requirement of Article VII, Section 5 of the Idaho Constitution. The Petitioner weaves this argument using broken thread. The legislature in Idaho Code § 63-3002 states the intent to make "insofar as possible . . . the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue code . . . subject only to modifications contained in the Idaho law," (emphasis added). The Petitioner fails to understand that the fabric of the Idaho income tax is Idaho law and not the Internal Revenue Code.⁴ The Internal Revenue Code may be used to provide guidance, but the Idaho income tax is woven by Idaho law using Idaho statutory thread. The Petitioner misreads Idaho Code § 63-3002. Idaho Code § 63-3002 only includes intent language. The Idaho income tax requirements are as set out in Idaho Code § 63-3022, and other applicable provisions of Idaho law. The final sentence in Idaho Code § 63-3002 also clearly states that, "All of the foregoing is subject to modifications in Idaho law . . ." In addition, the Idaho legislature specifically provided in Idaho Code § 63-3080 that the Idaho income tax is not a property tax. Therefore, as ruled by the Idaho Supreme Court in Diefendorf v. Gallet, 51 Idaho 619, 10 P.2d 307, (1932), the Idaho income tax act is not a property tax. The property tax uniformity provisions of Article VII, Section 5 of the Idaho Constitution that prohibit a graduated property tax are not applicable to the Idaho income tax.

CONCLUSION

It is well settled in Idaho that a Notice of Deficiency Determination issued by the Idaho State Commission is presumed to be correct. Albertson's Inc. v. State, Dept. of Revenue, 106

⁴ The Commission also finds that the case law Petitioner cites does not support his theory that the federal income tax is a property tax.

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IDAHO BOARD OF
TAX APPEALS

Idaho 810, 814 (1984); Parsons v. Idaho State Tax Commission, 110 Idaho 572, 574-575 ^{fn.2}

(Ct. App. 1986). The burden is on the Petitioner to show that the tax deficiency is erroneous. Id.

Since the Petitioner has failed to meet this burden, the Commission finds that the amount shown due on the Notice of Deficiency Determination is true and correct.

The Bureau also added interest, which interest will continue to accrue pending payment of the tax liability pursuant to Idaho Code § 63-3045(6), and penalty to the Petitioner's tax deficiency. The Commission finds those additions appropriate as provided for in Idaho Code §§ 63-3045 and 63-3046.

WHEREFORE, the Notices of Deficiency Determination dated September 4, 2008, are hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the Petitioner pay the following tax, penalty, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1996	\$2,879	\$ 720	\$2,460	\$ 6,059
1997	8,387	2,097	6,429	16,913
1998	2,736	684	1,887	5,307
1999	2,281	570	1,406	4,257
2000	2,928	732	1,572	5,232
2001	3,680	920	1,692	6,292
2002	2,133	533	843	3,509
2003	1,683	421	576	2,680
2004	2,286	343	645	3,274
			<u>TOTAL</u>	<u>\$53,523</u>

Interest is calculated through October 15, 2009.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

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IDAHO BOARD OF
TAX APPEALS

An explanation of the Petitioner's right to appeal this decision is enclosed.

DATED this 30 day of September, 2009.

IDAHO STATE TAX COMMISSION


COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of September, 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

PHILIP L. HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE, ID 83815

Receipt No 7008 1830 0004 0457 9455


Laurie J. Davies



7009 2620 0001 0601 5647



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MAR 31 2010

IDAHO BOARD OF
TAX APPEALS**Notice of Appeal to the Board of Tax Appeals**

March 30, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.


Dear State Tax Commission:

Please find enclosed a deposit of \$7,862.04 and \$1,600.00 to cover the twenty percent cash deposit required by Idaho Code 63-3049 (b). The amount of the alleged deficiency for these two docket numbers is \$27,609 plus \$24,518. Twenty percent of this amount is \$11,424.40.

Please consider this letter my promise to pay the remaining \$1,962.36. I am a member of the Legislature and have been in Boise since early January, except for weekends. I need to return home to the Coeur d'Alene area and be there during business hours in order to send the remaining \$1,962.36 to your office. The Legislature adjourned yesterday, and I expect to be back home by the end of this week. By April 9th I can have a check in the mail to your office for the remaining \$1,962.36.

The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the State Tax Commission

Sincerely,

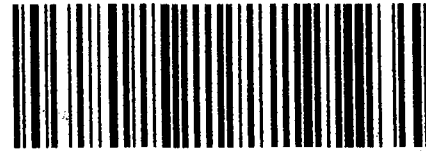

Philip Hart

Philip Hart
2900 Government Way 262
Coeur d'Alene, Idaho
83815

RETURN RECEIPT
REQUESTED

Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088

CERTIFIED MAIL™



7009 2820 0001 0602 2753



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83720

U.S. POST
PAID
BOISE, ID
83702
MAR 30, 2010
AMOUNT

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MAR 31 2010

IDAHO BOARD OF
TAX APPEALS

8372060088



Appeal of Philip L. Hart from the Final Order Dismissing and the Order of the
Idaho State Board of Tax Appeals Denying Reconsideration

Judicial District Court Case No. CV 10-9226
Idaho State Board of Tax Appeals No. 10-B-1289

CONTENTS OF RECORD OF PROCEEDINGS

List of documents prepared for Court:

1. Petitioner's initial Notice of Appeal dated March 30, 2010, received on March 31, 2010.
2. Petitioner's Idaho State Tax Commission Decision received April 1, 2010.
3. Petitioner's March 31, 2010, Notice of Appeal received April 1, 2010.
4. Idaho State Board of Tax Appeals Acknowledgment letter mailed April 5, 2010.
5. Petitioner's April 9, 2010, Notice of Appeal received April 12, 2010.
6. Respondent/Idaho State Tax Commission's Affidavit of Kristine Gambie in Support of Motion to Dismiss, Affidavit of Shelley Sheridan in Support of Motion to Dismiss and Memorandum in Support of Motion to Dismiss, and Motion to Dismiss - received April 15, 2010.
7. Petitioner's April 19, 2010, letter/response received April 21, 2010.
8. Petitioner's Notice of Appearance received April 26, 2010 (faxed copy received May 4, 2010).
9. Petitioner's - Appellant Mr. Hart's Memorandum in Opposition to Motion to Dismiss received May 21, 2010.
10. Petitioner's Motion for Extension of Time to Respond to Respondent's Motion to Dismiss Pursuant to Tax Appeal Rules 72 and 21, and Appellant Mr. Hart's Memorandum in Opposition to Motion to Dismiss received May 24, 2010.
11. Respondent/Idaho State Tax Commission's Reply to Appellant's Memorandum in Opposition to Motion to Dismiss received May 26, 2010.
12. Petitioner's correspondence dated June 21, 2010, received by fax June 21, 2010.

13. Petitioner's correspondence dated August 6, 2010, received by fax August 6, 2010.
14. Idaho State Board of Tax Appeals Final Order Dismissing Appeal mailed August 24, 2010.
15. Petitioner's - Appellant Mr. Hart's Motion for Reconsideration received September 3, 2010.
16. Idaho State Board of Tax Appeals Order Denying Reconsideration mailed September 24, 2010.
17. Petitioner's correspondence dated October 19, 2010, received by fax October 19, 2010.
18. Petitioner's - Appeal from the Idaho Board of Tax Appeals Pursuant to I.C. 63-812, and Rule 84 Idaho Rules of Civil Procedure received October 25, 2010, (fax copies received October 22, 2010).
19. Notice of Lodging of Transcript and Agency Record dated October 27, 2010, was sent on October 27, 2010, to Starr Kelso Esq., P.O. Box 1312, Coeur d'Alene, ID 83816-1312 and William A. Von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, ID 83722.

I certify that the within contains a complete record of proceedings before the Idaho State Board of Tax Appeals in this matter.

I do hereby certify that the foregoing is a true copy
of the original document on record in this office.

Date this 17th day of November 2010

BOARD OF TAX APPEALS

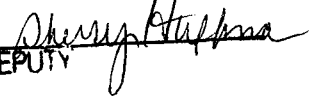
Susan Benfro

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

LAWRENCE G. WASDEN
ATTORNEY GENERAL
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

2010 DEC -2 PM 12: 52

CLERK DISTRICT COURT


DEPUTY

Attorney for the Idaho State Tax Commission

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	RESPONSE TO APPELLANT HART'S
-vs-	)	REPLY TO DEFENDANTS' 12(b)(1)
	)	MOTION TO DISMISS
IDAHO STATE TAX COMMISSION)	
and IDAHO BOARD OF TAX)	
APPEALS,)	
)	
Respondents.)	

COMES NOW, the respondent, Idaho State Tax Commission and hereby
responds to Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss.

I. OVERVIEW

This court does not have jurisdiction to review any of the issues upon which
Appellant Hart's appeal is based. An appeal to this court is limited by Idaho Code § 63-
3812(c) to issues that were presented by Appellant to the Board of Tax Appeals. The
only "issue presented" to the Board of Tax Appeals in Appellant Hart's case was whether
the Board of Tax Appeals had jurisdiction to hear the case. In Appellant Hart's appeal to

this court he recites a lengthy "Statement of Issues." The one and only issue which this court has jurisdiction to review, whether the Board of Tax Appeals had jurisdiction to hear the case, is not listed among Appellant Hart's "Statement of Issues" in his appeal to this court. For this reason, Respondent respectfully asks this court to dismiss Appellant's appeal.

II. DISCUSSION

APPEAL OF A BOARD OF TAX APPEALS DECISION TO THE DISTRICT COURT IS LIMITED TO ISSUES THAT WERE PRESENTED BY THE APPELLANT TO THE BOARD OF TAX APPEALS.

Idaho Code § 63-3812 provides that taxpayers may appeal "a decision of the board of tax appeals or a decision on a motion for rehearing." The scope of the appeal is limited by § 63-3812(c) which states that "[a]ppeals may be based upon any issue presented by the appellant to the board of tax appeals." The appeal is to "be heard and determined by the court without a jury in a trial de novo on the issues." An appellant receives a trial de novo, but this de novo review is only available for issues that were presented to the Board of Tax Appeals.

AN ISSUE CANNOT BE PRESENTED TO THE BOARD, OR TO A COURT, WHERE THE BOARD OR COURT LACKS JURISDICTION

Appellant hart is attempting to bootstrap issues which were not before the Board of Tax Appeals and are not before this court by misinterpreting provisions of the Idaho code § 63-3812. That code section provides in relevant part:

(c) Appeals may be based upon any issue presented by the appellant to the board of tax appeals and shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court.

§ 63-3812(c).

Apparently, it is Appellant Hart's position that since he attempted to file documents with the Board raising issues concerning the constitutionality of the Idaho income tax, that this court may properly review these issues even though the Board of Tax Appeals could not. Appellant's position, however, ignores the fact that the issues he is attempting to resurrect were not presented to the Board. Issues may only be properly presented to the Board and the Board may only consider issues if it has jurisdiction over the matter. Here, Appellant, through his own very deliberate actions denied the Board jurisdiction by failing to file a timely appeal. This court's jurisdiction is derivative of the Board's jurisdiction. Thus Appellant Hart's very conscious act of waiting nearly six months to file an appeal denied not only the Board of Tax Appeals jurisdiction to review this case, but also denied this court jurisdiction to review the matters in Appellant's pleadings.

**THE ONLY ISSUE PRESENTED TO THE BOARD OF TAX APPEALS IN
APPELLANT HART'S CASE WAS WHETHER THE BOARD HAD
JURISDICTION TO HEAR THE CASE.**

The only "issue presented" to the Board of Tax Appeals was whether Appellant Hart met the requirements of Idaho Code § 63-3049 such that jurisdiction existed for the Board of Tax Appeals to consider the merits of Appellant Hart's appeal. Before Appellant Hart ever had a chance to present any of the issues in his case to the Board of Tax Appeals, his case was dismissed for lack of jurisdiction. In the Board's "Final Order Dismissing Appeal" issued August 24, 2010, the Board stated, "A question of jurisdiction is fundamental; it cannot be ignored when brought to the court's attention and should be addressed prior to considering the merits of an appeal." See Board's *Final Order Dismissing Appeal*, at page 2. The Board found that Appellant Hart's appeal was not

timely filed in accordance with the requirements of Idaho Code § 63-3049 and that he also failed to meet the 20% pre-pay requirement set forth in the same section. Thus, Appellant Hart's appeal to the Board was dismissed for lack of jurisdiction and no issues beyond the jurisdiction question were ever presented to the Board.

THE DISTRICT COURT DOES NOT HAVE JURISDICTION TO HEAR APPELLANT HART'S APPEAL BECAUSE THE ONE AND ONLY ISSUE WHICH THIS COURT HAS JURISDICTION TO REVIEW IS NOT INCLUDED IN APPELLANT HART'S APPEAL TO THIS COURT.

This court does not have jurisdiction to review any of the issues which Appellant is raising. As set forth above, the only issue this court has jurisdiction to review is the one issue that was presented to the Board of Tax Appeals, which was whether the Board had jurisdiction to hear Appellant Hart's case. In section 4 of Appellant Hart's appeal to this court he lists his "Preliminary Statement of Issues." Appellant Hart's issues for appeal are lettered with letters "a" through "p." Appellant Hart presents numerous issues for this court to review; most of his issues are constitutional questions involving the Idaho and United States Constitutions. Among the many issues Appellant Hart has stated for this court to review, he failed to state the one and only issue which this court has jurisdiction to review: whether Appellant Hart met the requirements of Idaho Code § 63-3049 such that jurisdiction existed for the Board of Tax Appeals to consider the merits of Appellant Hart's appeal.

III. CONCLUSION

An appeal of a Board of Tax Appeals decision to the District Court is limited by § 63-3812(c) to issues that were presented by the appellant to the Board of Tax Appeals.

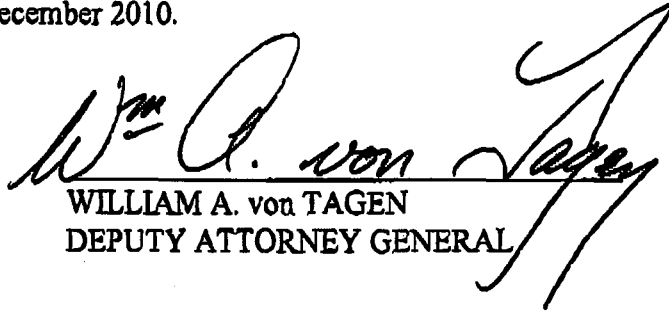
This court's jurisdiction, under § 63-3812, is derivative of the Board's jurisdiction. The only "issue presented" to the Board of Tax Appeals in Appellant Hart's case was whether

the Board of Tax Appeals had jurisdiction to hear the case. In Appellant Hart's appeal to this court he recites a lengthy "Statement of Issues," but failed to list the one and only issue which this court has jurisdiction to review: whether Appellant Hart met the requirements of Idaho Code § 63-3049 such that jurisdiction existed for the Board of Tax Appeals to consider the merits of Appellant Hart's appeal.

Consequently, this court is without jurisdiction to hear Appellant Hart's appeal.

The court has no alternative but to dismiss the appeal of Philip L. Hart.

DATED this 2nd day of December 2010.

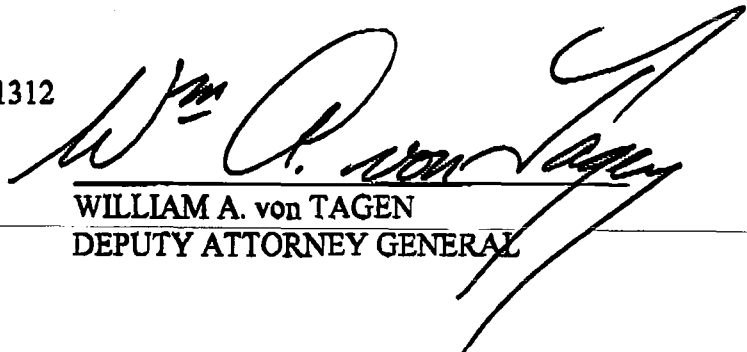

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 2nd day of December 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: } SS
 29
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CLERK DISTRICT COURT

Mally Bassett
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,

: CASE NO. CV 10-9226

vs.

: MOTION FOR IRCP RULE 11 (a) (1)
 SANCTIONS

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS,
 Respondents.

:

COMES NOW, Appellant Phil Hart, and hereby moves this Court for its Order pursuant to Idaho Rules of Civil Procedure Rule 11 (a) (1) sanctioning Respondents and their counsel for their pleading abuses in their Motion to Dismiss and their Response to Appellant Hart's Reply to Defendants Motion to Dismiss.

The basis of this motion is as follows:

1. Respondents inappropriately filed affidavits in support of their Rule 12 (b) (1) Motion to Dismiss requiring a response and motion to strike;
2. Respondents inappropriately cited the holding of the Idaho Supreme Court in *Ag Air, Inc. v. Idaho State Tax Commission*, 132 Idaho 345, 972 P. 2d 313 (1999);
3. Respondents inappropriately cited the holding of the Idaho Supreme Court in *Smith v. Arizona Citizens Clean Elections Commission*, 212 Arizona 407, 132 P. 3d 1187 (2006);
4. The Respondents in their Response inappropriately attempt to mislead this Court that "any issue presented" (I.C. 63-3812 (c)) means and/or is the same as "issues decided".

1 MOTION FOR IRCP RULE 11 (a) (1) SANCTIONS

Issues presented, or inherently arising as a result of a ruling or rulings, are "presented" even if they are not ruled on.

5. The Respondents in their Response inappropriately attempt to mislead this Court that Appellant Hart did not raise the issue of the Board of Tax Appeals holding that it did not have jurisdiction to hear his appeal. Specifically the issue of jurisdiction was raised in the Appeal as follows:

2. The actions for which judicial review is sought:

- a. BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO. In the Matter of the Protest of Philip L. Hart, Petitioner, DOCKET NOS. 21551 & 21552, DECISION dated September 30, 2009;
- b. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, FINAL ORDER DISMISSING APPEAL dated August 24, 2010;
- c. BEFORE THE IDAHO BOARD OF TAX APPEALS, IN THE MATTER OF THE APPEAL OF PHILIP HART from the decision of the Idaho State Tax Commission assessing additional income tax, penalty, and interest for taxable years 1996 through 2004, APPEAL NO. 10-B-1289, ORDER DENYING RECONSIDERATION dated September 24, 2010.
- f. Whether the State Board of Tax Appeals upheld the sanctity of Article III, Section 7 of the Idaho Constitution in failing to confirm Appellant's Constitutional obligation to his constituency?;
- g. Whether the Idaho State Tax Commission's and the State Board of Tax Appeals affirmation thereof, acceptance of Appellant Hart's checks, and his promise to pay (which he complied with) the remainder of a required cash deposit by a taxpayer as security, without ever advising Appellant that it was not acceptable security, was a violation of its own rules, regulations, and Due Process Clauses under the Idaho and U.S. Constitutions?;

2 MOTION FOR IRCP RULE 11 (a) (1) SANCTIONS

- h. Whether the Idaho State Tax Commission/Idaho Board of Tax Appeals is estopped from asserting, and/or has waived any alleged claim of, noncompliance by Appellant Hart with the "twenty percent deposit requirement" given its acceptance of Appellant Hart's cash payments, its acceptance of the cash deposit and Appellant Hart's promise to pay (without comment and without communication from its legal department that the promise was not acceptable), and its subsequent retention of the payment of the unpaid portion of the "twenty percent deposit requirement" when Appellant Hart paid it in full as promised?;
 - i. Whether the jurisdictional prerequisite requirement of a twenty percent deposit requirement of an any taxpayer, including Appellant Hart, contesting any notice of deficiency violates Appellant Hart's constitutional rights under the Due Process clause under the Idaho and U.S. Constitutions?;
 - k. Whether the State Tax Commission/Idaho Board of Tax Appeals refusal to acknowledge and accept the cash deposit filed with the State Tax Commission for at least one of the two entirely separate Docket Numbers regarding Appellant Hart, when the cash deposit was in excess of either of the individually "required" deposits, violates the statutes of Idaho, rules of the Commission and Board of Appeals, and Appellant Hart's Due Process rights under the Idaho and U.S. Constitutions.
 - m. Whether the State Board of Tax Appeals violated the statutes of Idaho, rules of the Board, and Appellant Hart's rights to Due Process under the Idaho and U.S. Constitutions by not holding a hearing on Appellant Hart's appeal.
6. The Respondents in their Response inappropriately attempt to mislead this Court in their argument that, if the Court finds none of the Preliminary Issues and the specific appeal of the applicable orders appealed from fail to address "jurisdiction", the Court has no jurisdiction. This is contrary to law and procedure. I.C. section 63-3812 (a) specifically provides that "The appeal shall be taken and perfected in accordance with

3 MOTION FOR IRCP RULE 11 (a) (1) SANCTIONS

Rule 84 of the Idaho Rules of Civil Procedure.”

Rule 84 specifically provides at 84 (d) (5),

“...the list of issues in the petition for judicial review shall not prevent the petitioner from asserting other issues later discovered.”

Rule 11 (a) (1) requires that a memorandum of law must be based upon knowledge, information, and belief after reasonable inquiry that it is well grounded in fact and is warranted by existing law and not to harass or to cause unnecessary delay or needless increase in the cost of litigation. All of the above reference matters are not well grounded in fact or warranted by existing law. The representations of legal precedent and applicability were simply misrepresentations of the law as applicable to the facts and have caused Appellant Hart to incur attorney fees and expenses in responding to these matters.

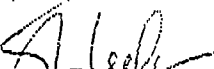
Oral argument is requested.

DATED this 3rd day of December, 2010.

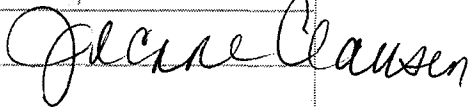


Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was faxed to William A. von Tagen, Deputy Attorney General, State of Idaho, on November 3, 2010.



Starr Kelso

Description	CV 2010-9226 Philip L. Hart vs Idaho State Tax Commission, et al 20101207 Judge: John T. Mitchell Court Reporter: Julie Foland Clerk: Jeanne Clausen		
Date	12/7/2010	Location	1K-COURTROOM8
			
Time	Speaker	Note	
<u>03:36:57</u> <u>PM</u>	Judge	Calls case -	
<u>04:26:17</u> <u>PM</u>	Judge	Calls case - Starr Kelson present for the pltf; William von Tagen present for respondents; motion to dismiss filed by respondents; motion for sanctions hasn't been noticed up for hearing; have read alot of information; reviews documents for this hearing; cites case law read for this hearing	
<u>04:32:13</u> <u>PM</u>	Starr Kelso	Motion to strike affd in support of motion to dismiss	
<u>04:32:55</u> <u>PM</u>	William von Tagen	Will withdraw those affd's	
<u>04:33:21</u> <u>PM</u>	Judge	Motion to strike is granted	
<u>04:33:29</u> <u>PM</u>	William von Tagen	Appeal of a Tax Commission decision; dismissal was because failure to filing a timely appeal; individual income tax case; Tax commission rec'd final federal determination in 2008; never been tax returns from 2006 to 2008; auditors filed 2 notices of deficiency; protested in timely fashioned and referred to commission; 1/15/09 appelant wrote of a continuance; 5/15/09 was granted until this time; he asked for another continuance until July 2009; info wasn't provided that was needed; commission issued it's decision; 63-30-49 he than had 91 days to file an appeal; 12/31/09 appelant stated he was a legislature that he was exept and didn't have to file appeal until after legislature; attempted to file appeal later; hadn't met 20% requirement; 4/15/10 filed motion to dism before board and response and reply; 8/24/10 ordered dismissal for lack of jurisdiction; 63-30-49 91 days and payment of 20% of tax is due; Tarbox; Ambrose; haven't met requirements of 63-38-12; any issue presented to board; weren't presented to board because they lacked jurisdiction; bootstrapping; had to be a	

		timely appeal - don;t have that; has to be a timely payment of 20% of tax due - don't have that either; he didn't even meet his own deadline; payment didn't come in until 4/13; viol and delibrate actions; acricle 3, section 7; not subject to civil process; not subject to criminal or civil arrest; not served with civil process, summons or subpoena; voluntary avail to filing a civil action; not manditory; statutes are requirements; availing himself to civil process; also policy requirements; 2008,2009 & 2010 pattern of own destruction
<u>04:45:59</u> <u>PM</u>	Starr Kelso	Here on 12(b)(1) motion for lack of jurisdiction; here if this court has jurisdiction; tax commission made a ruling; there is no hearing transcript in record; that is one if issues raised; this court has jurisdiction; Mr. Hart is following procedure; don't review issues from past
<u>04:48:40</u> <u>PM</u>	William von Tagen	Mr. Hart rec'd copy of decision and no appeal was filed until 3/31/10; payment wasn't paid until 4/13/10; there is no jurisdiction and dispute of facts
<u>04:49:19</u> <u>PM</u>	Judge	Will take this under advisement and will get a decision out asap

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STATE OF IDAHO)
County of KOOTENAI)ss

FILED 12-8-10

AT 12:50 O'Clock P. M
CLERK OF DISTRICT COURT

[Signature]
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDHAO BOARD OF TAX APPEALS,

Respondents.

Case No. **CV 2010 9226**

**MEMORANDUM DECISION AND
ORDER GRANTING
RESPONDENTS' MOTION TO
DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on petitioner's Philip L. Hart's (Hart) appeal of the decision of the "Idaho Board of Tax Appeal's Final Order Dismissing Appeal Appellant Hart's Appeal No. 10-B-1289 entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2010." Appeal From the Idaho Board of Tax Appeals Pursuant to I.C. 63-3812, and Rule 84 Idaho Rules of Civil Procedure, p. 1. For the reasons set forth below, this Court lacks jurisdiction over Hart's appeal.

On October 22, 2010, Hart filed his Appeal from the Idaho Board of Tax Appeals (IBTA) in the District Court. Hart's preliminary issues on appeal include: applicability of, and compliance with, Article III, Section 7 of the Idaho Constitution; whether the Income Tax Audit Bureau's Notices of Deficiency amounted to an unapportioned direct tax; whether the deficiency notices issued by the federal government are valid evidence of

taxes owed to the State of Idaho; and whether there was estoppel or waiver by respondent Idaho Tax Commission (Commission) of the twenty percent deposit requirement resulting from its acceptance of Hart's cash deposit and promise to pay, among other issues. *Id.*, pp. 2-5. On November 1, 2010, the Commission filed its Motion to Dismiss Hart's Appeal, along with the Memorandum in Support of Motion to Dismiss and the Affidavits of Shelley Sheridan and Kristine Gambee. [The Affidavit of Shelley Sheridan, filed November 1, 2010, purports to have five exhibits attached; however, the affidavit as filed with the Court has no attachments. The same affidavit, when filed as part of the agency record, does have the exhibits referenced therein attached.] On November 18, 2010, Hart filed his "Appellant Hart's Motion to Strike the Affidavits of Kristine Gambee and Shelley Sheridan Pursuant to IRCP 12(f)" and "Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss." On November 19, 2010, the Commission/IBTA filed the "Notice of Filing of Agency Record." On December 2, 2010, the Commission filed its "Response to Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss." On December 3, 2010, Hart filed his "Motion for I.R.C.P. Rule 11(a)(1) Sanctions." Oral argument on the Commission's motion to dismiss was held on December 7, 2010. At the conclusion of that hearing the Court took the matter under advisement. The above pleadings were reviewed by the Court and the Court has considered arguments of counsel at hearing.

Hart's motion to strike was heard at the December 7, 2010, hearing, and was granted. The information contained in the affidavits of Shelley Sheridan and Kristine Gambee, both filed on November 1, 2010, is stricken. However, the information contained in those affidavits is contained in the Notice of Filing of Agency Record, filed November 19, 2010.

Hart's motion for sanctions was not noticed up for hearing.

II. STANDARD OF REVIEW.

A motion to dismiss pursuant to I.R.C.P. 12(b)(1), which raises facial challenges to jurisdiction, is reviewed under a standard which mirrors the standard of review used under I.R.C.P. 12(b)(6). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 92005), citing *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). Thus, the Court looks only to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The question is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* On the other hand a factual challenge to jurisdiction will allow the court to go outside the pleadings without converting the motion into one for summary judgment. *Owsley*, 141 Idaho 129, 133, 106 P.3d 455 n. 1. This is a facial challenge to this Court's jurisdiction.

Idaho Code § 63-3812 sets forth that a taxpayer, assessor, the state tax commission or any party appearing before the board of tax appeals aggrieved by a decision of the board of tax appeals may appeal to the district court. I.C. § 63-3812; see also *Blanton v. Canyon County*, 144 Idaho 718, 720, 170 P.3d 383, 385 (2007).

Appeals may be based upon any issue presented by the appellant to the board of tax appeals and shall be heard and determined by the court without a jury in a trial de novo on the same issues in the same manner as though it were an original proceeding in that court. The burden of proof shall fall upon the party seeking affirmative relief to establish that the decision made by the board of tax appeals is erroneous. A preponderance of the evidence shall suffice to sustain the burden of proof.

The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in any other civil litigation. The court shall render its decision in writing, including therein a concise statement of the facts found by the court and conclusions of law reached by the court. The court may affirm, reverse or

modify the order, direct the tax collector of the county or the state tax commission to refund any taxes found in such appeal to be erroneously or illegally assessed or collected or may direct the collection of additional taxes in proper cases.

I.C. § 63-3812 (c).

III. ANALYSIS OF THE COMMISSION'S MOTION TO DISMISS.

On September 30, 2009, the Commission issued its decision in the matter giving rise to the instant appeal. Memorandum in Support of Motion to Dismiss, p. 2. Hart received a copy of the decision on October 2, 2009. On December 31, 2009, Hart wrote a letter to the Commission stating it was his intent to appeal the decision and arguing that, as a member of the Idaho State Legislature, he has the right to defer such filing until adjournment of the 2010 legislative session. Affidavit of Shelley Sheridan, Exhibit A. On March 31, 2010, Hart filed his appeal with the Idaho Board of Tax Appeals (IBTA) and submitted the amount of \$9,462.04 to the Commission. Memorandum in Support of Motion to Dismiss, p. 3. Hart stated he would send the remaining amount on April 9, 2010. *Id.* The Commission received an additional \$1,962.36 on April 13, 2010. *Id.* The IBTA issued a final Order dismissing Hart's appeal on August 24, 2010. *Id.* The IBTA found Hart's appeal untimely pursuant to I.C. § 63-6049 and stated:

Accepting *arguendo* Appellant's position that legislative immunity applies to this case, legislators are immune from civil proceedings both during the legislative session and ten (10) days prior to the commencement thereof. Thus, the tolling of the statute of limitations began on January 1, 2010, which was also the ninety-first day after the Appellant's receipt of the [State Tax Commission's] decision. The legislative session ended on March 29, 2010, meaning Appellant had until no later than March 30th to file a timely appeal, given that the ninety-one days had already passed by the time the statute of limitations would have begun to toll on January 1, 2010. Appellant filed his appeal on March 31, 2010. Even more compelling is Appellant's failure to fulfill the 20% pre-pay requirement until April 14, 2010, roughly two (2) weeks after the filing deadline had lapsed. On its face it appears Appellant's appeal was untimely filed on both counts. The Board is without jurisdiction to hear this appeal.

Final Order Dismissing Appeal, p. 2.

The Commission now asks this Court to dismiss Hart's appeal to the District Court. The Commission argues: "This motion is based upon this board's [presumably the Commission intended to write "this court's"] lack of jurisdiction resulting from the failure of the Appellant to strictly comply with the provisions of Idaho Code § 63-3049 in that the Appellant did not perfect his appeal in a timely fashion in as much as a notice of appeal was not filed within the 91-day period set forth in Idaho Code § 63-3049." Motion to Dismiss, p. 1. Hart replies:

This Court has jurisdiction to determine all the issues raised in this appeal, by trial de novo, including but not limited to whether Mr. Hart was required to strictly comply to I.C. section 63-3811 and section 63-3049, despite the Constitutionally mandated conduct, followed by Mr. Hart, under Article III section 7. In exercising its "jurisdiction" the Court may ultimately hold, based upon the evidence introduced at trial and its application of the law thereto, that Mr. Hart was required to but did not comply strictly with the statutory appeal requirements even considering Article III section 7. However, for the Court to hold it has no "jurisdiction" to determine all issues, including that one, would be to essentially eviscerate Article III section 7. Any such determination as to the applicability of Article II section 7 is a determination to be made by this Court *after* it exercises its "jurisdiction" and conducts a trial de novo.

Reply to Motion to Dismiss, p. 2. (*italics in original*).

The term "de novo" has been defined in *Beker Industries Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (1980) as:

[A] new hearing or a hearing for a second time, contemplating an entire trial in the same manner in which the matter was heard and review of the previous hearing. Black's Law Dictionary 5th ed. 1979, p. 649. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction. (citation omitted).

101 Idaho 187, 190, 610 P.2d 546, 549. Contrary to Hart's contention, the trial de novo contemplated in I.C. §63-3812 (c) is a standard of review, not an entitlement to this Court's exercising its jurisdiction. On point is *Fairway Development Co. v. Bannock*

County, 119 Idaho 121, 804 P.2d 294 (1990) (*Fairway III*). In *Fairway III*, the taxpayer challenged Bannock County's classification of its apartment complex, which resulted in a tax increase for the years 1980 to 1984. 119 Idaho 121, 122, 804 P.2d 294, 295. Over the following years, Fairway filed challenges with the Board of Equalization and the IBTA. The Idaho Supreme Court remanded the case to the district court for a determination of whether the appraisal method employed considered the actual and functional use of the property. *Fairway Development Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988) (*Fairway II*). On remand, the district court did not reach the issue of the appropriate appraisal method, but rather ruled it did not have subject matter jurisdiction to hear the tax assessment claims for Fairway's failure to have exhausted administrative remedies and dismissed Fairway's claims for 1980-1984. *Id.* Fairway appealed the district court's decision that as of the November 3, 1988, dismissal Fairway had lost its ability to litigate the tax assessment claims because of expiration of the time to appeal properly through administrative channels; the Supreme Court affirmed the dismissal on November 28, 1990. *Fairway III*, 119 Idaho 121, 122-123, 804 P.2d 294, 295-96.

Ultimately, in *Fairway III*, the Idaho Supreme Court held failure to exhaust administrative remedies deprives the district court of subject matter jurisdiction. 119 Idaho 121, 125, 804 P.2d 294, 298. The Court wrote:

In routine tax assessment complaints, this Court has made it clear that the pursuit of statutory administrative remedies is a condition precedent to judicial review. In *Franden v. Jonasson*, 95 Idaho 792, 793, 520 P.2d 247, 248 (1973), this Court wrote: "In Idaho it is clear that the pursuit of statutory administrative remedies is a condition precedent to judicial process concerning unequal tax assessment."

119 Idaho 121, 124, 804 P.2d 294, 297. The Idaho Supreme Court recognized that exceptions to the exhaustion doctrine exist, the Court quoted *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 586 P.2d 1068 (1978):

The law embodied in the holdings clearly is that sometimes [relief must not be denied for failure to exhaust]. No court requires exhaustion when exhaustion will involve irreparable injury and when agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief.

99 Idaho 624, 627, 586 P.2d 1068, 1071. The Court in *Fairway III* held no exception to the exhaustion doctrine existed where the issue is correctness of a tax assessment because “[i]n such a case, the district court does not acquire subject matter jurisdiction until all administrative remedies have been exhausted.” 119 Idaho 121, 125, 804 P.2d 294, 298. As in *Fairway III*, where the “filing was not in compliance with I.C. § 63-3812 in that appellant failed to file with the clerk of the board of tax appeals a notice of appeal pursuant to filing an appeal in district court”, in the present case, Hart failed to timely file his appeal with the IBTA, thereby divesting both the IBTA and this Court of subject matter jurisdiction. While Hart is correct in asserting his appeal is specifically provided for by statute and his appeal to this Court was timely, the question of subject matter jurisdiction can be raised by the Court at any time *sua sponte*, even if no party raises the issue of jurisdiction on appeal. *Erickson v. Idaho Bd. of Registration of Professional Engineers and Professional Land Surveyors*, 146 Idaho 852, 854, 203 P.3d 1251, 1253 (2009), citing *In re Quesnell Dairy*, 143 Idaho 691, 693, 152 P.3d 562, 564 (2007).

Here, the IBTA's Order from which Hart appeals recognizes that, even if Hart's Article III Section 7 argument for tolling of the deadline for filing his appeal were apt, his Appeal was nonetheless untimely. In *Heath v. Idaho State Tax Commission*, 134 Idaho 407, 409, 410, 3 P.3d 532, 535 (2000), the Idaho Court of Appeals concluded Heath's petition for declaratory judgment was properly dismissed as time barred under I.C. § 63-3049(a). The Idaho Court of Appeals stated it was of no import whether the Heath's

pleading was characterized as a petition for judicial review, as a declaratory judgment, or whether it was a direct or collateral attack on the Commission's decision, because the action was in substance a request for judicial relief from the Commission's determination of tax liability. Thus, it was governed by the procedural requirements of I.C. § 63-3049. 134 Idaho 407, 409, 3 P.3d 532, 534. "Because the limitation of that statute was not satisfied, the district court was without jurisdiction to hear the case." 134 Idaho 407, 409-10, 3 P.3d 532, 534-35. Just as in the present case, *Heath* involved a petition untimely filed by the smallest of margins. In *Heath*, the petitioners received the decision of the Commission on May 29, 1998, and filed their complaint for declaratory judgment and injunctive relief on August 31, 1998. 134 Idaho 407, 408, 3 P.3d 532, 533 (Ct.App. 2000). Similarly, in the instant matter, the decision was received on October 2, 2009, and the appeal was filed on March 31, 2010 (factoring in the very Article III section 7 argument Hart seeks to make).

Hart's "Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss" lacks any cogent legal argument as to why this Court has jurisdiction. Instead of providing legal argument, Hart makes the following circular, wholly unsupported claim that this Court simply *assume* it has jurisdiction:

Respondents' argument that this Court has no jurisdiction to hear Mr. Hart's *appeal*, is in effect asserting no court, anywhere at any level, has jurisdiction to determine whether or not they were correct in their rulings. How is the application of Article III section 7 ever judicially determined if, as Respondents assertion that this Court has no jurisdiction is given any credence? If that is what the statutory appeal rights contemplate, no judicial review because Respondents say so, what "right" does a "right" of appeal confer on any person appealing such a ruling? This Court has jurisdiction to determine all the issues raised in this appeal, by trial de novo, including but not limited to whether Mr. Hart was required to strictly comply to I.C. section 63-3811 and section 63-3049, despite the Constitutionally mandated conduct, followed by Mr. Hart, under Article III section 7. In exercising its "jurisdiction" the Court may ultimately hold, based upon the evidence introduced at trial and its application of the law thereto, that Mr. Hart was required to but did not comply strictly with the statutory appeal requirements even considering Article III section 7. However, for the Court to hold it has

no "jurisdiction" to determine all issues, including that one, would be to essentially eviscerate Article III section 7. Any such determination as to the applicability of Article III section 7 is a determination to be made by this Court *after* it exercises its "jurisdiction" and conducts a trial de novo.

Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss, pp. 1-2. What is truly remarkable about Hart's argument is Hart seems unable to reconcile that it was Hart who disregarded the time limitation Hart had within which to perfect Hart's appeal. It was Hart's decision alone to fail to timely perfect his own appeal. That fact and that fact alone is what caused the IBTA to lack jurisdiction to hear his appeal, and which now causes this Court to lack jurisdiction to hear Hart's appeal from the IBTA decision which decided that it lacked jurisdiction. Hart now laments to this Court that if this Court does not assume jurisdiction: "...is in effect asserting no court, anywhere at any level, has jurisdiction to determine whether or not they were correct in their rulings..." In that lamentation Hart simultaneously: 1) states the precise *result* of Hart's disregarding the time limit within which to perfect his appeal (no court will hear this) while at the same time 2) Hart fails to accept responsibility for Hart's own disregard of the time limitation in which Hart had to perfect his appeal.

Hart has truly confused the trial *de novo* concept. *If* this Court had jurisdiction to hear this appeal (it does not), it would be a trial *de novo*, is simply the *standard of review* of the underlying action of the IBTA. I.C. § 63-3812(c). Hart claims to understand that fact when Hart writes:

Here, Mr. Hart, is appealing the prior rulings of Respondents to this Court to be determined in a trial de novo. Mr. Hart is not before this Court because he is "seeking to invoke the jurisdiction of this court" by initiating an original action. Mr. Hart is appealing the Respondents' prior rulings pursuant to the statutory appeal procedure.

Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss, p. 4. However, Hart turns right around and feigns ignorance of that concept when he bootstraps the fact that

new evidence can be presented in a trial *de novo* into a circular argument that this Court can somehow use that new evidence to get around the jurisdictional issues. Hart argues:

In exercising its "jurisdiction" the Court may ultimately hold, based upon the evidence introduced at trial and its application of the law thereto, that Mr. Hart was required to but did not comply strictly with the statutory appeal requirements even considering Article III section 7.

Id., p. 1. Any such determination as to the applicability of Article III section 7 would be a determination made by this Court *after* it exercises its "jurisdiction" and conducts a trial *de novo*. But this Court cannot now hear new evidence to determine if it has jurisdiction. That is not the way jurisdiction works. Either this Court has jurisdiction right now to hear this appeal from the IBTA, or it does not. This Court does not have jurisdiction to hear this appeal from the IBTA, and new evidence at a trial *de novo* will never and can never change that fact. This Court does not have jurisdiction to hear this appeal from the IBTA because the IBTA lacked jurisdiction to hear the appeal from the Commission. The *only* reason the IBTA lacked jurisdiction to hear the appeal from the Commission is because Hart failed to timely file his appeal with the IBTA.

Hart argues the Commission inaccurately set forth the Idaho Supreme Court's holding in *Ag Air, Inc. v. Idaho State Tax Commission*, 132 Idaho 345, 972 P.2d 313 (1999) and the Arizona Supreme Court's holding in *Smith v. Arizona Citizens Clean Elections Commission*, 212 Ariz. 407, 132 P.3d 1187 (2006). Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss, pp. 2-5. In his "Motion for IRCP Rule 11(a)(1) Sanctions", Hart contends the Commission so misrepresented the holdings in these cases to the Court that sanctions against the Commission are appropriate. Motion for IRCP Rule 11(a)(1) Sanctions, p. 1, ¶¶ 3, 4. However, it is Hart who misrepresents the holdings of those cases. The Commission accurately stated the propositions

announced in *Ag Air* and *Smith*.

The Commission states *Ag Air* stands for the proposition that no jurisdiction exists until payment is made to the Commission. Memorandum in Support of Motion to Dismiss, p. 4. Idaho Code § 63-3049(b) states:

Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

(emphasis added). Indeed, the Idaho Supreme Court's holding in *Ag Air* is that I.C. § 63-3049(b)'s requirement that 20% of the assessed use tax be paid prior to appealing a decision of the tax commission is a jurisdictional requirement. 132 Idaho 345, 347, 972 P.2d 313, 315. The failure to timely comply with I.C. § 63-3049(b) divests the district court of jurisdiction to hear an appeal and a district court cannot extend the time within which a party must make the 20% deposit "[b]ecause a district court's jurisdiction is limited by the requirements of I.C. § 63-3049". 132 Idaho 345, 348, 972 P.2d 313, 316.

The Commission's interpretation of the Idaho Supreme Court's holding in *Ag Air* is entirely sound. Hart's claim that "The Supreme Court's decision had nothing to do with the "jurisdiction" of the District Court to hear an appeal in a de novo trial" (Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss, p. 2) is simply wrong. The third issue stated by the Idaho Supreme Court in *Ag Air* is "Whether *Ag Air*'s failure to timely comply with statutory jurisdictional requirements of I.C. § 63-3049 deprived the district court of jurisdiction to hear *Ag Air*'s appeal. 132 Idaho 345, 346, 972 P.2d 313, 314. Indeed, *Ag Air* is decided upon that singular issue. 132 Idaho 345, 347-48, 972 P.2d 313, 315-16.

Similarly, the Commission's interpretation of *Smith* is also proper. The

Commission argues *Smith* involves the Arizona Supreme Court's analyzing a Constitutional provision very similar to Article III section 7 of the Idaho Constitution, and that *Smith* determined the purpose of Article IV Part 2 section 6 of the Arizona Constitution was to prevent the criminal or civil arrest of state legislators, which would in turn would prevent the state legislators from attending legislative sessions.

Memorandum in Support of Motion to Dismiss, p. 6. The Arizona Supreme Court, sitting *en banc*, noted the provision was similar to one in the Federal Constitution "designed to avert an arrest, either criminal or civil, that would prevent a legislator from attending session." 212 Ariz. 407, 410, 132 P.3d 1197, 1190. The Arizona Supreme Court went on to determine the rationale of the provision did not apply in *Smith* case because, just as in Hart's case:

Smith is not defending a suit brought by another. Instead, Smith has invoked the jurisdiction of the courts.

Id. Hart claims the Commission's argument that *Smith* "... is persuasive authority is also a misapplication of the law and the facts to this case." Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss, p. 4. Hart argues the Commission misapplied the facts of *Smith* because: "*Smith* involved a civil suit which he brought (initiated) by himself." *Id.* If Hart had read the *Smith* decision Hart would know *Smith* did not involve a civil suit which Smith brought by himself. Hart would know *Smith* involved an Arizona state legislator, David Burnell Smith, whom the Arizona Clean Elections Commission determined violated campaign finance rules by spending seventeen percent more on his election than was allowed by law, and said Commission determined Smith should forfeit his office. 212 Ariz. 407, 409, 132 P.3d 1197, 1189. The Arizona Supreme Court stated "This is Smith's final review of several determinations at the administrative level..." Thus, there is no "misapplication of facts" by the Commission as Hart now

complains. Hart should know *Smith* is on point, Hart should know *Smith* is similar to Hart's own case. Hart should know that to argue the contrary is to attempt to deceive this Court. For Hart to take the extra step and claim the Commission has committed an offense which warrants *sanctions* (for Hart's claimed incorrect interpretation of *Smith* by the Commission) against the Commission's attorney under I.R.C.P. 11, is unthinkable.

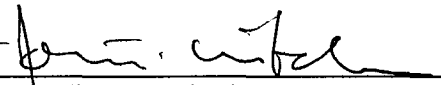
IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must grant the respondent Commission's motion to dismiss. This Court lacks jurisdiction to hear Hart's appeal.

IT IS HEREBY ORDERED respondent Commission's Motion to Dismiss is GRANTED due to lack of jurisdiction by this Court. Hart's "Appeal From the Idaho Board of Tax Appeals Pursuant to I.C. 63-3812, and Rule 84 Idaho Rules of Civil Procedure" is DISMISSED.

IT IS FURTHER ORDERED counsel for the Commission shall prepare a judgment consistent with this Memorandum Decision and Order Granting Respondent's Motion to Dismiss, and present such to the Court.

Entered this 8th day of December, 2010.


John T. Mitchell, District Judge

Certificate of Service

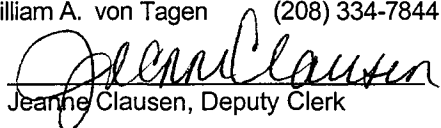
I certify that on the 8 day of December, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Starr Kelso

Fax #
208 664-6261 ✓

Lawyer
William A. von Tagen

Fax #
(208) 334-7844 ✓


Jeanne Clausen, Deputy Clerk

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1 SS

2010 DEC 14 AM 11:13

CLERK DISTRICT COURT

Molly Rose
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART, : CASE NO. CV 10-9226
Appellant,

vs. : MOTION FOR RECONSIDERATION
PURSUANT TO IRCP RULE 11(a) (2) (B)

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS, :
Respondents.

COMES NOW, Appellant Phil Hart, and hereby moves this Court pursuant to IRCP Rule 11 (a)(2)(B) to reconsider its Memorandum Decision dated December 8, 2010.

The basis of this Motion is that the Court failed to consider the fact, as established by the record from the Idaho Board of Tax Appeals, that Appellant's Notice of Appeal was filed on **March 30, 2010** and not March 31, 2010 as claimed by the Idaho Board of Tax Appeals. The Board's rules specifically address when an appeal is deemed filed:

IDAHO ADMINISTRATIVE CODE IDAPA 36.01.01 - Idaho Board of
Board of Tax Appeals Tax Appeals Rules

051. NOTICE OF APPEAL -- FILING STC APPEALS (RULE 51).

Notices of appeal to the Board from Idaho State Tax Commission decisions and any other papers required to be filed with the Board shall be deemed filed upon actual receipt by the clerk of the Board or, if mailed, such papers shall be deemed filed as of the federal post office postmark date. Postage meters do not designate the mailing date. (2-18-05)

1 MOTION FOR RECONSIDERATION

The second substantive page, after the "Contents" page is a copy of the envelope that the Notice of Appeal was mailed in to the Board. It reflects a USPS date of March 30, 2010. The appeal was timely filed. The Board made a clear error.

With regard to the statutory requirement that a 20% bond be filed under I.C. 63-3049(b):

- (b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

As reflected by the Appellant's Motion for Reconsideration in the record on appeal, document number 15 at pages 4 and 5 it is contended that:

1. Appellant deposited another type of security acceptable to the tax commission; and
2. Appellant, since there were two matters appealed from at least complied with the full deposit on one of the matters appealed from;
3. The requirement of a 20% appeal bond is unconstitutional.

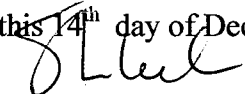
A preliminary hearing regarding the these issues, compliance with the requirement, and the constitutionality of the requirement is required.

Oral argument is requested. Notice of hearing will be filed once an available date is obtained from the Court.

CONCLUSION

The Court should reconsider its Memorandum Decision, find the 91 day filing period was met, and address, at least, the issues set forth above in 1,2, and 3 before rendering a ruling.

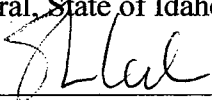
DATED this 14th day of December, 2010.



Starr Kelso, Attorney for Mr. Hart

2 MOTION FOR RECONSIDERATION

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on December 14, 2010.



Starr Kelso

3 MOTION FOR RECONSIDERATION

STARR KELSO
 Attorney at Law # 2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816-1312
 Tel: 208-765-3260
 Fax: 208-664-6261

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED: SK #638
 2010 DEC 16 AM 9:23

CLERK DISTRICT COURT
 DEPUTY *[Signature]*

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant

: CASE NO. 10-9226

: NOTICE OF HEARING ✓

vs.

: DATE: March 16, 2011,
 TIME: 4:00 P.M.

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS
 Respondents.

:

TO RESPONDENTS IDAHO STATE TAX COMMISSION AND IDAHO BOARD OF
 TAX APPEALS and your attorneys, William A. VonTagen, Deputy Attorney General.

YOU ARE HEREBY NOTIFIED that a hearing on Mr. Harts Motion for Reconsideration
 Pursuant to IRCP Rule 11(a)(2)(B) has been set for **March 16, 2011 at 4:00 PST** or as soon
 thereafter as counsel may be heard, before Judge John T. Mitchell, Kootenai County Courthouse
 501 Government Way, Coeur d' Alene Idaho.

DATED this 16 day of December, 2010.

[Signature]
 Starr Kelso, Attorney for Appellant Phil Hart

CERTIFICATE OF SERVICE : A copy was mailed to William A. VonTagen, Deputy
 Attorney General, State of Idaho P.O. Box 36, Boise Idaho 83722 on December 16 2010

[Signature]
 Stephanie Gossard

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

Attorney for the Idaho State Tax Commission

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 DEC 20 AM 11:13

CLERK DISTRICT COURT

Mally Rose
DEPUTY
m

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
)	
-vs-	)	RESPONSE TO APPELLANT'S MOTION
	)	FOR RECONSIDERATION
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS,)	
)	
Respondents.)	
)	

The issues raised by the appellant's motion for reconsideration have been fully briefed and presented to the court. The respondent, Idaho State Tax Commission, will rely upon arguments previously presented to this Court as well as upon arguments the Tax Commission presented to the Board of Tax Appeals in opposing the appellant's motion.

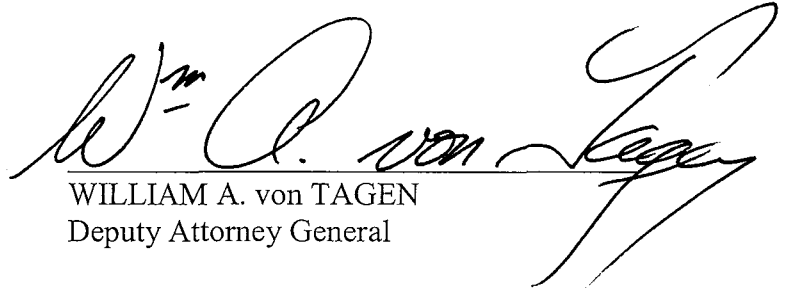
Respectfully submitted this 17th day of December 2010.

Wm A. von Tagen
WILLIAM A. von TAGEN
Deputy Attorney General

CERTIFICATE OF MAILING

I, the undersigned authority, do certify that I have mailed, by United States Mail, on this 17th day of December 2010, one copy of the RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION pursuant to the Idaho Rules of Civil Procedure to each of the parties, or their attorneys of record, in this cause in envelopes addressed as follows:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
Deputy Attorney General

STARR KELSO
 Attorney at Law # 2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816-1312
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Appellant Philip Hart

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED: 798

2011 JAN -4 PM 3:27

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant

CV
 : CASE NO. 10-9226

vs.

: NOTICE OF SERVICE
 OF DISCOVERY

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS
 Respondents.

COMES NOW, Appellant, by and through his attorney of record, Starr Kelso and gives
 notice that on this day Appellant served by facsimile APPELLANT'S REQUESTS FOR
 ADMISSIONS upon the following individual(s):

William A. vonTagen, Deputy Attorney General
 State of Idaho
 P.O. Box 36
 Boise Idaho 83722
 208-334-7844

DATED this 4th day of January, 2011.


 STARR KELSO
 Attorney for Appellant

NOTICE OF SERVICE OF DISCOVERY 1

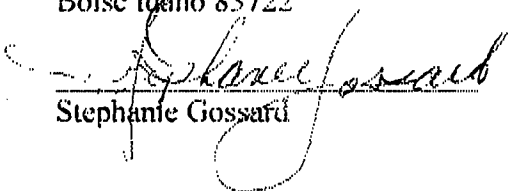
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document(s) was:

☐ Mailed;
☐ Hand-Delivered;
☒ Faxed 208-334-7844

this 4th day of January, 2011, to the following individual[s]:

William A. vonTagen
Deputy Attorney General, State of Idaho
P.O. Box 36
Boise Idaho 83722


Stephanie Gossard

NOTICE OF SERVICE OF DISCOVERY 2

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

Attorney for the Idaho State Tax Commission

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2011 JAN 10 AM 11:36

CLERK DISTRICT COURT

Patty Baskin
DEPUTY *JB*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
)	
-vs-	)	MOTION TO STRIKE AND OBJECTION
	)	TO APPELLANT'S REQUEST FOR
	)	PRODUCTION
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS)	
)	
Respondents.)	
)	

COMES NOW, Respondent, Idaho State Tax Commission, by and through its attorney of record, William A. von Tagen, Deputy Attorney General, and objects to Appellant's requests for production and respectively moves that the court strike Appellant's request for production.

This motion is based upon Idaho Rules of Civil Procedure (IRCP) section 84 and specifically IRCP 84(r) and the fact that the hearing on Appellant's Motion to Reconsider scheduled for March 16, 2011, is not an evidentiary hearing.

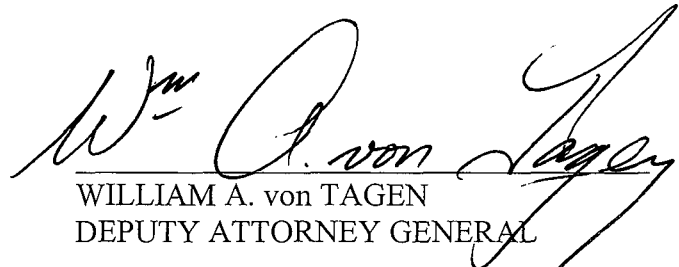
DATED this 7th day of January 2011.

Wm A. von Tagen
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 7th day of January 2011, served a copy of the within and foregoing MOTION TO STRIKE AND OBJECTION TO APPELLANT'S REQUEST FOR PRODUCTION by sending the same by United States mail, postage prepaid, in an envelope to:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

Attorney for the Idaho State Tax Commission

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2011 JAN 10 AM 11:36

CLERK DISTRICT COURT

Patty Buehler
DEPUTY *1/10*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	MEMORANDUM IN SUPPORT OF
-vs-	)	MOTION TO STRIKE AND OBJECTION
	)	TO APPELLANT'S REQUEST FOR
IDAHO STATE TAX COMMISSION and	)	PRODUCTION
IDAHO BOARD OF TAX APPEALS)	
)	
Respondents.)	
)	

The appellant filed a request for admissions on January 4, 2011 (Exhibit A). The respondent's motion to strike and objections are filed in direct response to the request for admissions of January 4, 2011.

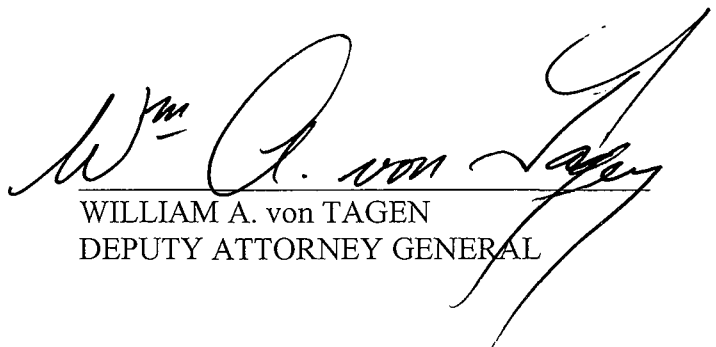
As the court is aware, this case involves the appeal of the dismissal of Appellant's appeal of a State Tax Commission decision by the Idaho Board of Tax Appeals. This court likewise dismissed Appellant's appeal of the Board of Tax Appeals order. Appellant filed a Motion to Reconsider before this court, and this court has set hearings on the Motion to Reconsider for March 16, 2011. Presumably, Appellant's discovery request is intended to support his Motion to Reconsider.

Idaho Code section 63-3812 governs appeals from decisions and orders of the Board of Tax Appeals. According to that Code section, an appeal to the district court is governed by Idaho Rule of Civil Procedure 84. Idaho Rule of Civil Procedure 84(r) directs that agency appeals under Rule 84 are governed by the Idaho appellate rules and not the Idaho Rules of Civil Procedure. The only time that the Idaho Rules of Civil Procedure apply are when there is to be an evidentiary hearing or *de novo* proceeding. A hearing scheduled for March 16, 2011, is neither an evidentiary hearing nor is it a *de novo* proceeding. The hearing scheduled for March 16, 2011, involves a legal question which this court will result by referring to the record before the court and applying Idaho law.

To allow discovery at this stage of this case is simply not allowed under Rule 84 nor is it allowed under the statutes which govern appeals from either the Idaho Board of Tax Appeals or from the Idaho State Tax Commission.

Respondent respectfully requests that the purported discovery of the appellant be stricken.

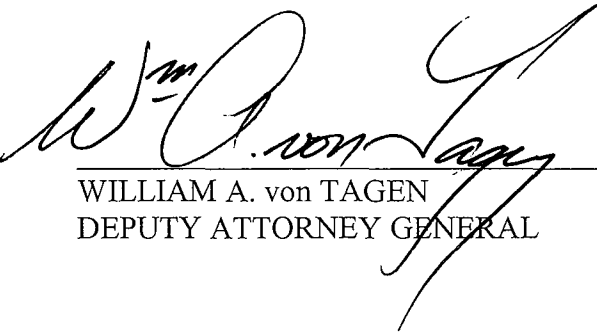
DATED this 7th day of January 2011.


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 7th day of January 2011, served a copy of the within and foregoing MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AND OBJECTION TO APPELLANT'S REQUEST FOR PRODUCTION by sending the same by United States mail, postage prepaid, in an envelope to:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STARR KELSO
 Attorney at Law # 2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816-1312
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant

: CASE NO. 10-9226
 : APPELLANT'S FIRST
 : REQUESTS FOR ADMISSIONS

vs.

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS
 Respondents.

:

:

:

COMES NOW, the Appellant in the above entitled matter, by and through Starr Kelso his attorney of record, hereby requests that you answer the following Requests for Admissions within thirty (30) days from service hereof, in accordance with the provisions of Rule 36, Idaho Rules of Civil Procedure.

1. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the "Notice of Appeal to the Board of Tax Appeals", dated March 30, 2010.

RESPONSE:

2. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the envelope received by the Board of Tax Appeals in which the Notice of Appeal was mailed.

RESPONSE:

3. Please admit that the envelope in which the Notice of Appeal to the Board of Tax Appeals was mailed reflects that it was mailed by certified mail deposited with the federal post office on March 30, 2010.

Requests for Admissions 1

RESPONSE:

4. Please admit that the envelope in which the Notice of Appeal was sent to the Board of Tax Appeals referenced in Request for Admission number 3 contained, with the Notice of Appeal, two checks in the respective sums of \$7,862.04 and \$1,600.00.

RESPONSE:

5. Please admit that the "Notice of Appeal to the Board of Tax Appeals" filed with the District Court was "received" by the Board of Tax Appeals on March 30, 2010.

RESPONSE:

6. Please admit that the two checks in the respective sums of \$7,862.04 and \$1,600.00 referenced in Request for Admission number 4 were cashed.

RESPONSE:

7. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of a letter dated April 9, 2010 from Philip L. Hart.

RESPONSE:

8. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the envelope received by the Board of Tax Appeals in which the letter referenced in Request for Admission number 7 was contained.

RESPONSE:

9. Please admit that the envelope, referenced in Request for Admission number 8, in which the letter referenced in Request for Admission number 7 was mailed reflects that it was mailed by depositing it with the federal post office on April 9, 2010.

RESPONSE:

10. Please admit that the letter dated April 9, 2010 was received by the Board of Tax Appeals on April 9, 2010.

RESPONSE:

11. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of a check from Philip L. Hart dated April 9, 2010 in the sum of \$1,962.36 that was contained in the envelope referenced in Request for Admission number 8.

Requests for Admissions 2

RESPONSE:

12. Please admit that the check in the sum of \$1,962.36 referenced in Request for Admission number 11 was cashed.

RESPONSE:

13. Please admit that the total sum received through the respective three checks reference in Requests for Admission numbers 4 and 11 is the sum of \$11,424.40.

RESPONSE:

14. Please admit that the total \$11,424.40 referenced in Request for Admission 13 was deposited with the State Tax Commission.

RESPONSE:

15. Please admit that neither the Board of Tax Appeals nor the State Tax Commission have ever returned the \$11,424.40 referenced in Request for Admission number 14 to Mr. Hart.

RESPONSE:

16. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the April 14, 2010 letter from William A. von Tagen, Deputy Attorney General, acting as the attorney for the State Tax Commission, to Mr. Hart.

RESPONSE:

17. Please admit that the letter referenced in Request for Admission number 16 acknowledges the receipt of the total of \$11,424.40 from Mr. Hart by the State Tax Commission.

RESPONSE:

18. Please admit that the Idaho Administrative Code of the Board of Tax Appeals at IDAPA 36.01.051 provides:

"Notices of appeal to the Board from Idaho State Tax Commission decisions and any other papers required to be filed with the Board shall be deemed filed upon actual receipt by the clerk of the Board or, if mailed, such papers shall be deemed filed as of the federal post office postmark date. Postage meters do not designate the mailing date. (2-18-05)"

RESPONSE:

19. Please admit that Idaho Code section 63-3049, in part, provides:

Requests for Admissions 3

"(b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission."

RESPONSE:

20. Please admit the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the April 5, 2010 letter from Susan Renfro, Director and Clerk to the Board (State Tax Commission) to Mr. Hart.

RESPONSE:

21. Please admit that the letter referenced in Request for Admission number 20 did not advise Mr. Hart that his promise to pay did not constitute deposit of an amount equal to twenty percent (20%) of the amount asserted by the State Tax Commission by cash or other type of security acceptable to the tax commission.

RESPONSE:

22. Please admit that the letter referenced in Request for Admission number 20 states, in part: "When the appeal has been perfected, a hearing will be scheduled within 90 days of the date of this letter."

RESPONSE:

23. Please admit that the amount of the alleged tax deficiency for docket number 21551 was \$27,609.

RESPONSE:

24. Please admit that the amount of the alleged tax deficiency for docket number 21552 was \$24,518.

RESPONSE:

25. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the letter from William A. von Tagen, attorney for the State Tax Commission, dated April 14, 2010 to Mr. Hart.

RESPONSE:

Requests for Admissions 4

26. Please admit that the letter referenced in Request for Admission number 25 states, in part:
"We have received your payment of \$1962.36 for the remaining 20% required to file an appeal."

RESPONSE:

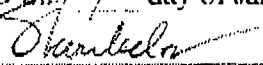
27. Please admit that the letter referenced in Request for Admission number 20, based upon the rule of the Board of Tax Appeal referenced in Request for Admission number 18, incorrectly states that Mr. Hart's appeal was "filed on March 31, 2010."

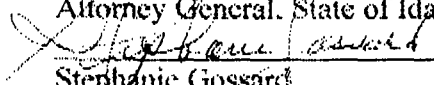
RESPONSE:

28. Please admit that based upon the rule of the Board of Tax Appeal referenced in Request for Admission number 18, Mr. Hart's appeal was "filed" on March 30, 2010.

RESPONSE:

DATED this 4 day of January, 2011.


Starr Kelso, Attorney for Appellant Phil Hart


CERTIFICATE OF SERVICE : A copy was ^{FIXED} ~~mailed~~ to William A. VonTagen, Deputy Attorney General, State of Idaho P.O. Box 36, Boise Idaho 83722 on January, 14 2011.

Stephanie Gossard

208-334-7844

STARR KELSO
 Attorney at Law # 2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816-1312
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Appellant Philip Hart

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant

: CASE NO. 10-9226

vs.

: NOTICE OF SERVICE
 OF DISCOVERY

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS
 Respondents.

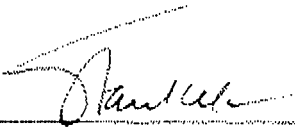
:

:

COMES NOW, Appellant, by and through his attorney of record, Starr Kelso and gives
 notice that on this day Appellant served by facsimile APPELLANTS REQUESTS FOR
 ADMISSIONS upon the following individual(s):

William A. vonTagen, Deputy Attorney General
 State of Idaho
 P.O. Box 36
 Boise Idaho 83722
 208-334-7844

DATED this 4th day of January, 2011.


 STARR KELSO
 Attorney for Appellant

NOTICE OF SERVICE OF DISCOVERY 1

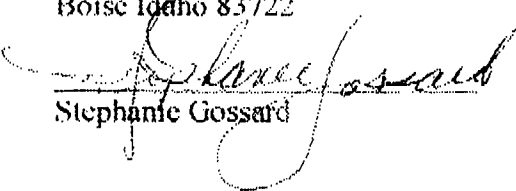
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document(s) was:

☐ Mailed;
☐ Hand-Delivered;
☒ Faxed 208-334-7844

this 4th day of January, 2011, to the following individual[s]:

William A. vonTagen
Deputy Attorney General, State of Idaho
P.O. Box 36
Boise Idaho 83722


Stephanie Gossard

NOTICE OF SERVICE OF DISCOVERY 2

STARR KELSO
Attorney at Law # 2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816-1312
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Appellant Phil Hart

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

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CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS
Respondents.

: CASE NO. 10-9226
: APPELLANT HART'S
: REPLY TO RESPONDENTS'
: RESPONSE TO MOTION
: FOR RECONSIDERATION

:

:

COMES NOW the Appellant Phil Hart, by and through his attorney Starr Kelso, and
hereby submits his Reply to Respondents' Response to Appellant's Motion for Reconsideration.

INTRODUCTION

In Mr. Hart's written response to Respondents' Motion to Dismiss, and at hearing, counsel for Mr. Hart attempted to discuss with the Court that the IRCP Rule 12(b)(1) issue of jurisdiction presented for consideration was whether the Court had jurisdiction hear the appeal. The issue before the Court, at this stage of proceedings under Rule 12 (b)(1) "facial" challenge to jurisdiction, and could not have been, whether the Idaho Board of Tax Appeals (IBTA) had properly determined whether it, the IBTA, had jurisdiction. That is one of the very issues for this Court to determine, upon a proper record, in this appeal. Counsel moved to strike the two affidavits submitted by Respondents in support of their IRCP 12 (b) (1) motion to dismiss for lack of jurisdiction. The Court properly granted the motion to strike. As will be discussed below the record filed with the Court by the IBTA is not in evidence. It is a mere articulation of Respondents' position, and nothing more. Since the Court did not raise, or inquire into,

1 Reply to Respondents' Response to Motion for Reconsideration

considerations of “facial” versus “factual” review of a jurisdictional issue during oral argument at hearing it was presumptively understood that the Court appreciated the fact that the issue presented by Respondents’ motion to dismiss was a “facial” challenge and would limit itself to the pleadings in making its determination.

It is not disputed that a taxpayer may appeal a decision by the IBTA to the district court by filing an appeal in the district court pursuant to Idaho Code section 63-3812 and Idaho Rules of Civil Procedure Rule 84. The Respondents have not at any time asserted to this Court that Mr. Hart’s appeal to this Court from the IBTA was not timely filed.

THE DISTRICT COURT CORRECTLY IDENTIFIED THE STANDARD OF REVIEW (“FACIAL”)

Respondents’ Motion to Dismiss which is obviously merely a copy of the State Tax Commission’s Motion to Dismiss filed with the IBTA and the heading changed does not allege that Mr. Hart’s petition for review filed in this Court, of the IBTA’s decision, was not timely filed within the twenty-eight (28) days. Respondents’ motion simply copies what it alleged before the IBTA, where they alleged that the “*board*” (IBTA) lacked jurisdiction.

The Court, in its decision, identified, and distinguished, an IRCP 12 (b)(1) “*facial*” challenge to jurisdiction, from an IRCP 12 (b)(1) “*factual*” challenge to jurisdiction. The Court, based upon the Respondents’ motion to dismiss, correctly determined that it was presented with a “facial challenge to this Court’s jurisdiction.” (Mem. Dec. p. 3) The Court correctly noted that in resolving a “facial” challenge to jurisdiction “the Court looks only to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party.” (Mem. Dec. p. 3)

The Court after correctly determined that Respondents’ motion was a “*facial*” challenge to its jurisdiction under IRCP Rule 12 (b) (1), its review should have been limited to a review of the pleadings.

The IRCP define “pleadings” at Rule 7(a) as a complaint and answer. The only “pleading” before the Court for the purpose of this Rule 84 judicial review of the IBTA is the Rule 84 (b) Petition.

2 Reply to Respondents’ Response to Motion for Reconsideration

Mr. Hart's pleading, on its face ("facial"), establish the date of the last decision of the IBTA appealed from and the date of the filing of the appeal. These factual allegation, which are not disputed, conclusively establish this Court's "facial" jurisdiction to hear Mr. Hart's appeal of the IBTA's decision.¹ Under a "facial" determination of its jurisdiction the Court's review of the pleadings fully concluded its review of Respondents' "facial" challenge to jurisdiction.

THE COURT'S DECISION IS USED THE WRONG STANDARD OF REVIEW

The Court, rather than conducting a "facial" review and limiting itself to the review of the pleadings, proceeded with a "factual" review of the challenge to its jurisdiction. The Court incorrectly proceeded in its memorandum decision to consider, and rely upon, matters outside of the pleadings. It considered and relied upon the record from the IBTA and the arguments of Respondents as to what they believe the record established as facts. The "factual" review was an error of law.

IRCP Rule 84 (e), in relevant part, specifically provides as follows:

"When the statute provides that review is de novo, the appeal shall be tried to the District Court on any and all issues, on a new record." (emphasis added)

The administrative record of the matter sought to be reviewed is to be utilized "as merely an articulation of the position of the Tax Commission as a party to the action." *Gracie, LLC v. Idaho State Tax Com'n*, 149 Idaho 570, 237 P. 3d 1196 (Idaho 2010).

As the Court noted in its decision Respondents filed two affidavits, those of Shelley Sheridan and Kristine Gambée. Mr. Hart based upon the nature of Respondents' "facial" challenge to jurisdiction specifically objected to the utilization of matters outside of the pleadings, and the conversion of the 12(b)(1) motion into one for summary judgment. The Court properly granted Mr. Hart's motion to strike both affidavits. (Mem. Dec. p. 2)

A "factual" challenge to the Court's jurisdiction is one whose determination has to be made after a hearing, or upon an affidavit supported motion for summary judgment, or upon a determination based upon facts introduced at hearing or trial. A decision by the Court on a

¹ The Court's decision specifically acknowledges that "Mr. Hart is correct in asserting his appeal is specifically provided by for by statute and his appeal to this Court was timely." (Mem. Dec. p. 7)

3 Reply to Respondents' Response to Motion for Reconsideration

“factual” issue of can not be based upon a mere articulation of the position of the Respondents. It must be based “on a new record.” IRCP Rule 84 (e).

Utilization of a “factual” determination on a IRCP Rule 12 (b) (1) “facial” challenge to jurisdictional is error.

EVEN UNDER A “FACTUAL” REVIEW
THE DECISION IS CLEARLY ERRONEOUS

The Court’s decision based upon utilization of a “*factual*” determination is nonetheless clearly erroneous. The articulation of Respondents’ position, their submitted record, does not support their claim. The question of jurisdiction (*factual*) depends upon the resolution of contested facts. The Court must defer its decision upon that question until the resolution of the factual issue, after it receipt of evidence. *see Anderson v. Gailey, 97 Idaho 813, 555 P. 2d 144 (Idaho 1976).*

The *Owsley v. Idaho Industrial Commission, 141 Idaho 129, 106 P. 3d 455 (2005)* case cited by the Court addresses both “*facial*” and “*factual*” jurisdictional determination procedures. The Idaho Supreme Court specifically references *Osborn v. United States, 918 F. 2d 724 (8th Cir. 1990)*. The *Osborn* Court explains that jurisdictional issues can be questions of law (facial) or questions of fact (factual). A “factual” determination may be requested by a respondent when the pleadings establish “facial” jurisdiction.

The *Osborn* Court, references *Crawford v. United States, 796 F. 2d 924 (7th Cir. 1986)* for an explanation of how a Court is to proceed, when the pleadings establish “facial” jurisdiction, if the defendant “thinks the court lacks jurisdiction.” *Id p. 730.*

“If the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue.”

As the 9th Circuit also elaborates, in *United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University, 147 F. 3d 821 (9th Cir. 1998),*

“...the district court may resolve factual disputes based on the evidence presented where the jurisdictional issue is separable from the merits of the case.”

Should the Respondents request an evidentiary hearing on “factual” jurisdiction the evidence presented by Mr. Hart at the hearing will clearly establish this Court’s jurisdiction on

this matter. The evidence presented will also clearly establish that the determination made by the IBTA, based upon facts its own record and their own rules under IDAPA, was clearly erroneous.

The facts that Mr. Hart will present at an evidentiary hearing on this Court's "factual" jurisdiction (which are facts are actually already documented already in the record supplied by the IBTA) are the following:

1. Mr. Hart's Notice of Appeal of the decision of the State Tax Commission on both Docket number 21551 and Docket number 21552 was filed when Mr. Hart placed it in the custody of the federal post office, as reflected by the postmark, on March 30, 2010;
2. The total bond for the appeal of separate case Docket 21551 was met when the two checks were filed on March 30, 2010 with the Notice of Appeal. The total bond for the appeal of separate case Docket 21552 was met by either, or all, of the following: (1) the two checks and the promissory note filed on March 30, 2010; (2) that portion of the two checks filed on March 30, 2010 in excess of the bond required for case Docket 21551 and the "satisfaction of the promissory note by cash filed on April 9, 2010; and/or (3) the filing of the third check on April 9, 2010 that "perfected" the appeal of case Docket 21552;
3. The IBTA's letter to Mr. Hart, dated April 5, 2010, incorrectly represented the date of the filing of Mr. Hart's Notice of Appeal, on both case Dockets, as March 31, 2010;
4. Even if the IBTA's letter dated April 5, 2010 is liberally construed in favor of Respondents to be considered to be an IDAPA 36.01.01.048.01 "notice from the Board" that Mr. Hart's appeal was "materially defective or not substantially in compliance with the requirements," Mr. Hart, under this very same administrative rule, "shall have fourteen (14) days to amend and perfect" his appeal;
5. Fourteen (14) days from April 5, 2010 was through April 19, 2010;
6. Mr. Hart under any interpretation of the rules and statutes "perfected" his appeal of both case Dockets within his fourteen (14) day period to do so under the IBTA's rules of procedure;
7. There was satisfaction of Mr. Hart's March 30, 2010 promise to pay when Mr. Hart filed his third check in full satisfaction of his promise to pay the remaining total bond

5 Reply to Respondents' Response to Motion for Reconsideration

amount due on both case Docket appeals. The filing of satisfaction occurred on April 9, 2010 when Mr. Hart filed his third check by placing the check in the custody of the federal post office, as reflected by the postmark;

8. Respondents' actual *physical receipt* of Mr. Hart's third check in satisfaction of the total bond for both separate case Dockets appealed from, and specifically the second case Docket 21552 occurred on April 13, 2010 before the expiration of his express time period to "perfect" his appeal of both case Dockets;
9. That any "material defect" or failure of "substantial compliance" that may have existed in Mr. Hart's filing of his appeal from case Docket 21551 on March 30, 2010 was "perfected" by his letter filed on March 31, 2010;
10. That any "material defect" or failure of "substantial compliance" that may have existed with regard to Mr. Hart's appeal from case Docket 21552, was "perfected" on April 9, 2010.
11. The "perfecting" of Mr. Hart's appeal of each of the two separate case Dockets, if it had not already occurred by his filing of the two checks and his promissory note on March 30, 2010, and Mr. Hart's letter filed March 31, 2010, occurred at least ten (10) days *prior* to the time specifically granted to him by IDAPA administrative rule 36.01.01.048.01 to "perfect" the appeal.

The Court's premature "factual" jurisdiction decision is in error by its:

(1) adopting Respondents articulation of its position on the 12(b)(1) motion without an evidentiary hearing on the fact issue of jurisdiction;

(2) not taking into consideration the IBTA's own IDAPA's rules regarding filing by mail when the envelopes reflecting the federal post office postmark in the record prepared by the IBTA establish a March 30, 2010 filing date and not the March 31, 2010 date claimed by Respondents;

(3) not taking into consideration the IBTA's own IDAPA rule on "perfecting" an appeal after notice;

6 Reply to Respondents' Response to Motion for Reconsideration

(4) not taking into consideration addressing the fact that two distinct case Docket decisions of the State Tax Commission were appealed from by Mr. Hart.

Mr. Hart's reply to the motion to dismiss, his motion to strike the two affidavits, and oral argument were directly focused upon the fact that the "pleading" before the Court clearly reflects that this Court has "facial" jurisdiction. As was argued the Court has jurisdiction to determine jurisdiction. Such a determination, beyond a "facial" review of the pleadings, occurs under a "factual" jurisdictional evaluation after a hearing/trial. The Court's determination of its jurisdiction under a "factual" jurisdiction review will inherently also determine whether the IBTA correctly determined it had no jurisdiction,

The nature of the Court's memorandum decision was completely unforeseeable on a 12 (b) (1) motion challenging "facial" jurisdiction of this Court when the pleadings establish "facial" jurisdiction. It was unforeseeable that the Court would accept as established facts the Respondents' position on a "facial" challenge when there was no dispute of the pleading's compliance with the statute giving the Court jurisdiction. It was unforeseeable the Court would, after identifying the challenge as "facial" proceed with a "factual" analysis. It was unforeseeable that even a "factual" analysis would find no jurisdiction when the "record unequivocally establishes that the Respondents' position under its own rules, is obviously not correct. It was unforeseeable that the Court would give any credence to stricken affidavits when they assert facts that are clearly in err based upon the IBTA's record and its own rules and when the affidavits stricken contain allegations regarding filing dates of the Notice of Appeal and the two respective bond amounts are on their face when viewed in conjunction with the "record" obviously not correct. It was unforeseeable that the Court would preclude Mr. Hart from presenting evidence, at a trial or hearing before the Court proceeded with any factual determination let alone a determination of jurisdiction based upon a "factual" standard It was unforeseeable that the Court would identify the correct standard ("facial") but then apply an incorrect ("factual") standard.

7 Reply to Respondents' Response to Motion for Reconsideration

APPLICABLE LAWS AND ADMINISTRATIVE CODE PROCEDURES

The applicable laws and administrative code procedures are:

1. I.C. section 63-3049 provides that an appeal from the IBTA is to be filed within 91 days after the receipt of notice.
2. Article III, Section 7 Idaho Constitution (which the IBTA accepted *arguendo*) applies.²
3. IDAPA 36.01.01.021 LIBERAL CONSTRUCTION (Rule 21). These rules (Idaho Board of Tax Appeals Rules) will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board.
4. IDAPA 36.01.01.048. NOTICE OF APPEAL—DEFECTIVE APPEALS (RULE 48)
 01. Amendment or Dismissal. Upon the filing of any notice of appeal it will be inspected by the Board and if found to be materially defective or not substantially in compliance with the requirements of this chapter the Board may dismiss such appeal or require its amendment. After notice from the Board, the appellant shall have fourteen (14) days to amend and perfect such appeal. Failure to perfect the appeal may result in dismissal of the appeal without further notice.
5. IDAPA 36.01.01.51. NOTICE OF APPEAL—FILING STC APPEALS (RULE 51)

Notices of appeal to the Board from Idaho State Tax Commission decisions...shall be deemed filed ..., if mailed, such papers shall be deemed filed as of the federal post office postmark date. Postage meters do not designate the mailing date.
6. IDAPA 36.01.01.055 CONSOLIDATION—HEARINGS AND DECISIONS (RULE 55)
 01. Appeals and Hearings. Whenever it shall appear to the Board or presiding officer that two (2) or more...issues exist in ...tax type cases, the Board or the presiding officer may issue a written or verbal order consolidating the cases for

² The IBTA could not proceed to determine this constitutional issue. The proper forum for determining constitutional issues is the District Court. *see Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P. 3d 455 (2005).

8 Reply to Respondents' Response to Motion for Reconsideration

hearing. There shall be no consolidation of cases where the rights of any party would be prejudiced by such procedure.

7. IDAPA 36.01.01.066. FILING OF DOCUMENTS (RULE 66)

- a. Filing Place. All documents filed with the Board shall be filed with the clerk of the Board at the Board's mailing address or street address.

FURTHER ARGUMENT

Respondents' final "Response" to Mr. Hart's Motion for Reconsideration merely states that they "rely upon arguments previously presented to this Court."³ As reflected in the Motion for Reconsideration, and memorandums in support thereof, the Respondents reliance is not supported by the IBTA record supplied to this Court.⁴

RESPONDENTS' "RESPONSE" PERPETUATES THEIR PRIOR
MISREPRESENTATIONS TO THIS COURT

Respondents continue to misrepresent to this Court the following:

1. "...on March 31, 2010, Appellant filed a Notice of Appeal with the State Board of Tax Appeals..." (Memorandum in Support of Motion to Dismiss p. 2 and p. 3) and "*Appellant filed his appeal on March 31, 2010.*" (Board of Tax Appeals Order dated August 24, 2010). (emphasis added)

These representations are not supported by, and contrary to, the record

³ It is inappropriate for Respondents to continue to assert obviously erroneous facts and misrepresent the record, law, and IDAPA rules to this Court, in response to the initial memorandum in support of Mr. Hart's Motion for Reconsideration.

⁴ Since the Court erroneously relied upon the Record prepared by the Board of Tax Appeals, which include the two affidavits that were offered by Respondents in its Motion to Dismiss but stricken pursuant to Appellant's motion, the affidavit of Phil Hart is filed herewith. This affidavit is not filed as a waiver of the rule that the record is a mere articulation of Respondents' position. It is merely offered to rebut, and clearly establish a question of fact, regarding the fact that Mr. Hart's checks and promise to pay were filed with the envelopes on the dates reflected on the postmarks. These facts do not appear to have been disputed by Respondents, even though they continue to assert the "filing" date was March 31, 2010 despite the fact that their own rules specifically provide that the date of filing was the date of mailing, March 30, 2010. Mr. Hart's affidavit should only be considered by the Court if the Court continues to consider the record as evidence and not a mere articulation of Respondents position.

9 Reply to Respondents' Response to Motion for Reconsideration

on appeal filed with the District Court and the IBTA rules. At IDAPA 36.01.051, the IBTA's own rules regarding appeals from the State Tax Commission specifically provide that *the date of mailing*, as reflected on the federal post office postmark, *is the filing date*.

“Notices of appeal to the Board from Idaho State Tax Commission decisions and any other papers required to be filed with the Board shall be deemed filed upon actual receipt by the clerk of the Board ***or, if mailed, such papers shall be deemed filed as of the federal post office postmark date.*** Postage meters do not designate the mailing date. (2-18-05)”

The record on appeal establishes that Mr. Hart's Notice of Appeal, as documented by the envelope in which it was mailed and the federal post office postmark placed thereon by the federal post office, was filed on March 30, 2010. The Respondents representation in this regard is not correct.

2. “No payment whatsoever was received until it was *mailed by the taxpayer on March 31, 2010.*” (emphasis added) (Respondents' Memorandum in Support of Motion to Dismiss at page 4)

The record specifically documents that Mr. Hart's first two checks, as filed with the Notice of Appeal, were filed when Mr. Hart placed the envelope containing them into the custody of the federal post office on March 30, 2010. These two checks were in respective amounts of \$7,862 and \$1,600. Pursuant to the clear wording of IDAPA 36.01.051 the two checks, in addition to Mr. Hart's other security and “substantial compliance” promise to pay the amount remaining on the *total* due for 20% of *both* Docket numbers (21551 and 21552), was *filed on March 30, 2010*, the date of the federal post office postmark. The Respondents representation in this regard is not correct.

3. “The code section (63-3049) is also clear that...***the taxpayer shall secure payment of the tax by depositing cash*** with the Tax Commission in an amount equal to 20 percent of the amount asserted.” (emphasis added) (Respondents' Memorandum in Support of Motion to Dismiss at page 7)

The law, in Idaho, contrary to this representation by Respondents, does *not* require “cash.” Idaho code section 63-3049, specifically provides that:

“In lieu of the cash deposit, ***the taxpayer may deposit any other type of security acceptable to the tax commission.***” (emphasis added-see attached Exhibit D)

10 Reply to Respondents' Response to Motion for Reconsideration

The IBTA rule at IDAPA 36.01.01.021 specifically provides that in interpreting its own rules the following applies:

“021. LIBERAL CONSTRUCTION (Rule 21)

These rules will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board. “

If the IBTA record is considered as factual “evidence” it establishes, by the federal post office postmark on the envelope Respondents received, that Mr. Hart’s two checks, in the respective sums of \$7,862.04 and \$1,600.0 and Mr. Hart’s promissory note to pay the remaining total (“other type of security), for the appeals of *both* case Dockets, of \$1,962.36, was placed in the custody and control of the federal post office, and filed, on *March 30, 2010*. The *date of filing was, by IDAPA rule, March 30, 2010*. The record also shows by the federal post office postmark on the envelope that Respondents received in full “satisfaction” of Mr. Hart’s promise to pay the remaining cash for the appeal of the second case Docket (21552), in the sum of \$1,962.36, by filing it by placing it in the custody and control of the federal post office, on April 9, 2010. This was a full ten (10) days before the expiration IDAPA rule 36.01.01.048 period to “perfect” his appeal, after receipt of a notice from the IBTA. The Respondents representation in this regard is not correct.

At no time after Mr. Hart’s March 30, 2010 filing of his Notice of Appeal, his filing of his two checks, and his filing of his promise to pay, did the Board of Tax Appeals or the Tax Commission notify or advise Mr. Hart that his two checks and his promise to pay the remaining portion of cash as bond for Docket 21552 was not permissible as a “type of security acceptable to the tax commission.” The April 5, 2010 letter merely stated that “The Board cannot determine whether your appeal has been perfected.”

The total bond, for both case Docket appeals, was accepted. No money has ever been returned to Mr. Hart. The total 20% amount due on the appeal on the first case Docket 21551 was *filed*, in cash, on March 30, 2010. The majority (substantial compliance) of the 20% due on the appeal of the second case Docket 21552, was made in cash, and the remainder of the bond required for the appeal of case Docket 21552 was satisfied by Mr. Hart’s promise to pay cash on April 9, 2010. Mr. Hart’s full satisfaction of his promise to pay (other type of security) occurred,

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as promised, on April 9, 2010 when the final cash payment was filed. This cash payment, in satisfaction of the promise to pay, was filed when Mr. Hart placed it in the custody and control of the federal post office as documented by the federal post office postmark. This satisfaction cash payment was made within the fourteen (14) day period subsequent to the April 5, 2010 letter available to Mr. Hart to “perfect” his appeal, even if this letter is found to be an IDAPA notice to Mr. Hart of a materially defective or not substantial compliance in the filing of his appeal.

The record also establishes, by the letter dated April 14, 2010 from William A. von Tagen Deputy Attorney General for the State Tax Commission, that the State Tax Commission “received your payment of \$1962.36 *for the remaining 20% required to file an appeal.*” The Record also establishes that at no time did the IBTA, or the State Tax Commission, return, any of the total 20% cash bond, for both appeals, paid by Mr. Hart that it received and deposited as his express payment for the bond required for his appeal of the two separate case Dockets.

The Respondents further, for some unknown reason, assert the total combined bond amount for the appeal of the separate case Dockets was required to be filed, or neither of the Docket decisions was appealable.

The Respondents in their letter to Mr. Hart of April 5, 2010 failed to make any assertion that the promissory note from Mr. Hart was not acceptable security to it. Respondents fail to even address their acceptance and retention of the cash, the promissory note, and their acceptance of Mr. Hart’s third check in satisfaction of the promissory note. Respondents’ letter of April 14, 2010 specifically acknowledges they “received your payment of \$1962.36 for the remaining 20% required to file an appeal.” If Respondents’ are asserting, in good faith, that their retention of Mr. Hart’s payments was not for the total bond due for both separate case Docket appeals, in view of Mr. Hart’s directions, their conduct would constitute a violation of I.C. section 63-4007. This statute specifically requires that *payments made by a taxpayer may not be applied to any tax obligation disputed by the taxpayer and such monies shall only be applied in accordance with the taxpayer’s directions.*⁵

⁵ In this regard the Court’s attention, should it continue to consider the mere articulation of Respondents’ position as reflected in the record prepared by the IBTA, is directed to page 3 of the State Tax Commission’s Memorandum in Support of (it’s) Motion To Dismiss, dated April 15, 2010. This memorandum filed with the IBTA by the State Tax Commission, at page 3, second line from the top of the page represents that “*To date, the Appellant has paid a total*

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It is not disputed even in the IBTA record filed with this Court:

1. Mr. Hart had 91 days to file his appeal from the decision of the State Tax Commission on his appeal from both separate case Dockets (21551 and 21552). The 91st day was January 1, 2010. January 1, 2010 was a federal and state holiday. To afford Mr. Hart his 91 days to file an appeal, like any other person, he is entitled as a matter of law to another day because payment could not have been made or received by either of the Respondents on January 1, 2010. Respondents' offices were closed. see IDAPA 36.01.01.065. The next day available for filing, which was not a Saturday, Sunday, or legal holiday, barring any other limitation to the running of the time period to file his appeals factor, would have been Monday, January 4, 2010.
2. Mr. Hart is an Idaho State Representative.
3. Article III, Section 7 of the Idaho Constitution provides in relevant part that;
"representatives in all cases,...shall be privileged from...and shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof."
4. The Idaho State Legislature went into session on January 11, 2010. Ten days *next before* January 11, 2010 was January 1, 2010. Pursuant to Article III, Section 7 of the Idaho Constitution the 91 day appeal limitation period stopped running until close of business on the *next day after the end* of the legislative session.⁶
5. The legislative session ended on March 29, 2010.
6. The first "next day after" the legislative session available to Mr. Hart to file his appeal, in accordance with the 91 day limit, was March 30, 2010.
7. Mr. Hart's appeal was placed in the custody and control of the federal post office on March 30, 2010. This is documented by the federal post office postmark on the envelope

of \$11,424.40 to the Tax Commission on his outstanding deficiency." There is, and has never been any direction made by Mr. Hart to Respondents that this payment was made "on his outstanding deficiency." To the contrary, Mr. Hart's Notice of Appeal filed on March 30, 2010 and Mr. Hart's letter filing his third check in satisfaction of his promissory note in his March 30, 2010 filing specifically identify the payments as payment of the required 20% bond. The fact that Mr. Hart's payments were directed by him to be for the limited purpose of the 20% bond on appeal is documented, and confirmed, by Mr. von Tagen's letter to Mr. Hart dated April 14, 2010. In that letter Mr. von Tagen represents that the \$11,424.40 paid by Mr. Hart was, pursuant to Mr. Hart's direction, in payment of the "20% required to file an appeal."

⁶ This was assumed *arguendo* by the IBTA.

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in the record on appeal. Under the IBTA's own rules the date of filing is the date reflected on the federal post office post mark on the envelope containing the Notice of Appeal. Mr. Hart's appeal, on both Dockets was filed on March 30, 2010, the 91st day to file his appeals.

8. On March 30, 2010 Mr. Hart filed, in addition to his Notice of Appeal, his two checks in the respective sums of \$ \$7,862.04 and \$1,600.00 along with his promise to pay the remaining total amount due, for both appeal on both dockets, on April 9, 2010.
 9. On April 9, 2010 Mr. Hart, in full satisfaction of his promise, filed the remaining \$1,962.36 due as the *total* 20% due to appeal *both* Docket number 21551 and Docket number 21552 of the State Tax Commission by placing the payment in the custody and control of the federal post office as documented by the federal post office post mark.
 10. As documented in the record on April 14, 2010 William A. von Tagen, Deputy Attorney General wrote to Mr. Hart on behalf of the State Tax Commission. Mr. von Tagen's letter's clear wording acknowledges that the State Tax Commission "received your payment of \$1962.36 for the remaining 20% required to file an appeal."
 11. At no time did the IBTA or the State Tax Commission notify or advise Mr. Hart that his promise to pay the remaining total of the combine docket amount was not a "type of security acceptable to the tax commission."
 12. Neither the IBTA nor the State Tax Commission after receiving, cashing, depositing, and controlling all of Mr. Hart's cash bond payments, have ever returned, or attempted to return the \$11,424.40 paid by Mr. Hart as the required total combined 20% deposit on his appeal from both Docket decisions.
 13. Mr. Hart's two checks, in the respective sums of \$ \$7,862.04 and \$1,600.00, were filed by when he placed them in the custody and control of the federal post office, on March 30, 2010, greatly exceeded the 20% required (by cash or otherwise) to be filed by him to appeal the State Tax Commission's decision regarding case Docket number 21551 of the State Tax Commission.
 14. That the majority of the 20% cash along with "other type of security" for Mr. Hart's appeal of the State Tax Commission's decision in case Docket number 21552 was filed
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when he placed them in the custody and control of the federal post office, on March 30, 2010. His “other type of security” was fully satisfied by cash when he placed it, his check for \$1,926.36, in the custody and control of the federal post office on April 9, 2010 and received, cashed, and deposited by the State Tax Commission.

15. The total of all of Mr. Hart’s checks, filed by mail, equal the total 20% required (by cash or otherwise) to be filed for Mr. Hart to appeal both of the State Tax Commission’s decisions in both case Docket number 21551 and case Docket number 21552 of the State Tax Commission.
16. Mr. Hart’s appeal of both Docket number 21551 and Docket number 21552 was filed on March 30, 2010. Mr. Hart’s appeal of Docket number 21552 “perfected” no later than April 9, 2010.

BOND

A. Timing and Compliance with 20% bond requirement

It is clear that the Court’s decision adopted Respondents’ erroneous position that March 31, 2010 was the filing date. As discussed the date of *filing* was March 30, 2010. IBTA based upon the record, and in disregard of its own rules under IDAPA, erred in holding March 31, 2010 was the date that the Notice of Appeal on both dockets (21551 and 21552) was filed. Likewise the IBTA disregarded its own IDAPA rules when it ignored Mr. Hart’s right to an additional fourteen (14) day period in which to perfect his appeal of Docket number 21552.

When the March 30, 2010 filing date is acknowledged, *Ag Air, Inc. v. Idaho State Tax Commission*, 132 Idaho 345, 972 P. 2d 313 (1999) solidly supports Appellant Hart’s argument that the statutory appeal process to this Court is being followed by this appeal.

B. Two separate Notices of Deficiency, Two separate Appeals

Given Mr. Hart’s timely appeal and full compliance with the payment of the 20% bond requirement, should the Court nonetheless determine that *both* appeals were not “perfected” timely it must be recognized that the appeal addresses two separate and distinct notices of deficiency and two separate case Dockets respectively numbered 21551 and 21552. The decision

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of the State Tax Commission dated September 30, 2009 from which Mr. Hart's appeal to the IBTA taken represents in its first sentence that this "is an individual income tax case." (singular) Thereafter it represents that "The NODs" (plural) advised the Petitioner that he could petition for a redetermination of "the NOD." (singular) The decision contained in the record states at page 1 thereof, at footnote 1, that "two separate NODs were issued." (plural) While the decision of the State Tax Commission's combined its rulings on the two separate case Dockets into one decision it specifically references both separate case Docket numbers. Counsel for Mr. Hart has not located a rule of the State Tax Commission in IDAPA 35.02.01 that permits it to combine two separate case Dockets and enter one decision on both separate case Dockets. While the State Tax Commission combined its two decisions on the "two separate NODs" there are nonetheless two separate case Dockets and two separate case Docket decisions appealed from by Mr. Hart to the IBTA. Mr. Hart's appeal of both separate case Docket decisions was timely and that the total 20% combined bond for both appeals to the IBTA was complied with. However, if the Court were to determine that while the appeal was timely filed the bond was not paid in combined total, and for some reason it was required to be in combined total, for both separate case Docket appeals, despite the IDAPA time period allowed Mr. Hart to "perfect" both appeals, the combination of the two dockets by the State Tax Commission would be prejudicial, inappropriate and totally without basis.

While the State Tax Commission rules do not provide for separate NODs, and thus separate case Dockets, to be combined, the IBTA rules under IDAPA at 36.01.01.055.01, do provide that a "written or verbal order" may be issued by the Board or presiding officer "*consolidating the cases for hearing.*" The rule does not provide in any manner that the separate bond required for the appeal of each separate case Docket number may be combined for a total that must be paid before either of the case Dockets is deemed appealed.

IDAPA Rule 36.01.01.055.01 provides that when two separate cases involve similar issues a written or verbal order consolidating the two separate cases "*for hearing*" may be entered. There is no record of such an order being entered regarding the consolidation, for hearing, of the two separate case Dockets respectively numbered 21551 and 21552. The April 5, 2010 letter

from the “Director and Clerk of the Board” (not the Board or presiding officer) does state that the letter is “Re: Appeal No. 10-B-1289, Docket Nos. 21551 and 21552.”

Assuming, *arguendo* only, that this April 5, 2010 letter meets the requirement of a written or verbal order, *it is still not appropriate* because the rule specifically provides as follows:

“There shall be no consolidation of cases where the rights of any party would be prejudiced by such procedure.”

With regard to the two cases (Docket numbers 21551 and 21552 respectively), because of the true and correct filing date of the appeals from the decision of the State Tax Commission on both cases any order by the IBTA consolidating them for bond amount determination would be, without basis in rule and also prejudicial to Mr. Hart because he obviously filed the separate 20% cash bond required for compliance in case Docket 21551. While the referenced IDAPA rule certainly contemplates that separate cases may be consolidated *for hearing*, it just as certainly does not provide, or even contemplate, that the 20% bond requirement can be utilized for purposes of determining whether *both* separate cases, respectively, complied with the 20% bond requirement. There certainly is no dispute, under any analysis of the IDAPA rules and the statutes that the 20% bond for at least one of the appeals (case Docket 21551) was timely filed because of the March 30, 2010 postmarked filing date of the appeal of both cases.

Appeal of Case Docket number 21551

1. Timeliness

The utilization of the correct filing date of March 30, 2010 establishes that the Notice of Appeal was timely filed.

2. Bond

The 20% bond to appeal case Docket 21551 was complied with by the two checks filed on March 30, 2010.

There is no question given the correct filing date of March 30, 2010 and the payment of the first two checks that the appeal, and 20% bond, for case Docket 21551 was properly filed and the IBTA decision clearly erroneous.

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Appeal of Case Docket number 21552

1. Timeliness

The utilization of the correct filing date of March 30, 2010 establishes that the Notice of Appeal was timely filed.

2. Bond

The 20% bond to appeal case Docket 21552 was complied with by the filing of the two checks and Mr. Hart's promissory note contained in his letter filed March 30, 2010.

A "negotiable instrument" (I.C. section 28-3-104) is an unconditional promise to pay a fixed amount of money...

Mr. Hart's promise to pay in his letter of March 30, 2010 was an unconditional promise to pay money on April 9, 2010....if it (the unconditional promise to pay)

- a. Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.

In this case the promise to pay was payable to the State Tax Commission at the time it was issued and came into possession of the State Tax Commission, March 30, 2010.

- b. Is payable at a definite time.

In this case the promise to pay was payable at a definite time, April 9, 2010.

- c. Does not state any other undertaking or instruction by the person promising payment to do any act in addition to the payment of money.

In this case Mr. Hart's promise to pay did not state any other undertaking or instruction. Mr. Hart's March 30, 2010 promise to pay was a "note". I.C. section 28-3-104 (5).

Mr. Hart's promise to pay of March 30, 2010 was issued for value because it was issued as security for an antecedent claim (bond on a tax deficiency determination in dispute) against him, whether or not the claim is due. I.C. 23-3-303 (c).

I.C. section 63-3049 provides, in relevant part, that:

In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

IDAPA 36.01.01.021 provides in relevant part, that:

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“These rules will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board. “

A note that is taken for an obligation suspends the obligation to the same extent the obligation would be discharged if an amount of money equal to the amount of the note were taken. I.C. section 28-3-309. Suspension of the obligation continues until the note is dishonored. I.C. section 28-3-309 (2) (b).

I.C. section 28-3-310 provides for an accord and satisfaction if the person against whom a claim is asserted proves that (i) a note was tendered in good faith as full satisfaction of the claim; (ii) the amount of the claim (the tax deficiency) was subject to a bona fide dispute; (iii) the “claimant” obtained payment of the instrument.⁷

The State Tax Commission at no time subsequent to the March 30, 2010 filing of the Notice Appeal, checks, and promissory note, satisfaction of the promised sum, and cashing of all three checks advised Mr. Hart that the filing or the bond for both appeals, let alone case Docket number 21552, was inadequate in any manner. The record on appeal contains correspondence from Susan Renfro dated April 5, 2010 that merely states that “The Board can not determine whether your appeal has been perfected” and further that upon its determination of its question it will proceed as follows: “*When* the appeal has been perfected, a hearing will be scheduled within 90 days of the date of this letter.” Mr. Hart was not advised that the cash and promissory note was not sufficient posting of the bond. Further the letter erroneously states *that the appeal was “filed on March 31, 2010.”* Correspondence subsequent to the April 9, 2010 filing of the satisfaction of the promissory note by Mr. Hart, sent by the State Tax Commission by Deputy Attorney General von Tagen and dated April 14, 2010 states, “We have received your payment of \$1962.36 for the remaining 20% required to file an appeal” and “I have enclosed copies of the receipts for your payments...for a total of \$11,424.40” the total amount of the 20% bond for both separate case Docket appeals.

As discussed above the payments received and cashed by the State Tax Commission have been never been returned to Mr. Hart. Idaho Code section 63-4007 specifically provides that the payments may not be applied to any tax obligation disputed by the taxpayer and shall

⁷ If nothing else, these three issues raise questions of fact.

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only apply such payment in accordance with the taxpayer's directions. In this case it is not disputed that all the payments made by Mr. Hart were paid by him with regard to his appeal of the two separate case Dockets that he was appealing and that they were filed by Mr. Hart for the purpose of complying with the bond for both case Docket appeals.

Mr. Hart's promise to pay and his payment in satisfaction of the promise at the time promised satisfies the provisions of Idaho Code section 63-3049 that permits a taxpayer to "deposit any other type of security acceptable to the commission" as a matter of law. If the Court does not hold that the promise and payment is "other security" as a matter of law, it should schedule an evidentiary hearing to determine whether in fact the promise and payment was sufficient "other security" and, if not, whether the Commission should be estopped from asserting that it was not "other security" for which a timely and appropriate satisfaction was paid with regards to Docket number 21552 and accepted by Respondents. Regardless Mr. Hart's cash filing on April 9, 2010 perfected his appeal of Docket number 21552.

CONCLUSION

The Court should reconsider its Memorandum Decision and Order Granting Respondents' Motion to Dismiss and enter its Decision and Order denying the Motion to Dismiss. A correct application of a "facial" determination of this Court's jurisdiction establishes this Court does have jurisdiction. If the Court chooses to apply a "factual" determination of its jurisdiction the record supplied by the IBTA this very record, under IBTA's own rules, establishes "factual" jurisdiction of this Court. If the Respondents request an evidentiary hearing on a perceived "factual" determination of jurisdiction, the Court should order one held. If the Court has any question regarding its "factual" jurisdiction, and it decides to consider the IBTA record in any record since it is not a "new record," Mr. Hart requests an evidentiary hearing on "factual" jurisdiction be held.

The Respondents' representations as well as the IBTA decision exposes a fundamental misapplication by the State Tax Commission and the IBTA of their own rules and the governing statutes in Mr. Hart's two separate case Docket appeals.⁸

Once the correct filing date of March 30, 2010 and initial compliance with the bond requirement for both separate case Docket appeals is acknowledged, the issue if raised by Respondents in some appropriate manner before this Court, becomes what effect Article III, Section 7 of the Idaho Constitution has on the time limitation applicable to Mr. Hart's filing of his appeal from both separate case Dockets. While the Court's Memorandum Decision acknowledges Article III, Section 7, of the Idaho Constitution, the Court makes no decision on its applicability because of its adoption of the erroneous filing date argued by the Respondents. If Article III, Section 7 of the Idaho Constitution applies to Mr. Hart as a member of the Idaho Legislature to his appeal from the State Tax Commission two separate case Docket decisions to the Board of Tax Appeals, his appeal of both separate case Docket numbers was timely filed. The determination of a constitutional issue is not the province of the IBTA. It is the domain of the District Court upon proper notice, briefing, and hearing held.

The Court should reconsider it's Memorandum Decision and deny Respondents' Motion to Dismiss.

DATED this 24th day of January, 2011.



Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was faxed on the 24th day of January, 2011 to William A. von Tagen, attorney for the Respondents.



Starr Kelso

⁸ In this regard Mr. Hart requests that the Court take Judicial Notice pursuant to IRCP Rule 44 (d) that the State Tax Commission apparently interprets its governing statutes and rules in varying manners depending upon factors that may, or may not, be legitimate. This position is supported by the resignation of the Chairman of the Idaho Tax Commission, on January 7, 2010, after the Speaker of the Idaho House of Representatives, on January 6, 2010, publicly supported an investigation into allegations that the Chairman used his official position to help clients of his son, and his own friends, involving disputes before the State Tax Commission.

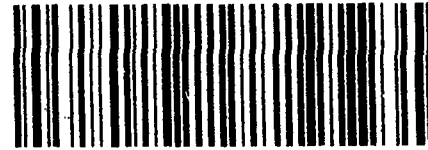
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Philip Hart
2900 Government Way 262
Coeur d'Alene, Idaho
83815

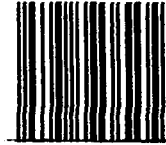
RETURN RECEIPT
REQUESTED

Board of Tax Appeals
P.O. Box 83720
Boise, Idaho 83720-0088

CERTIFIED MAIL



7009 2820 0001 0602 2753



1000 — 83720

U.S. POST
PAID
BOISE, ID
83702
MAR 30
AMOUNT
\$5.1
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RECEIVED

MAR 31 2010

IDAHO BOARD OF
TAX APPEALS

83720\$0088



Notice of Appeal to the Idaho Board of Tax Appeals

RECEIVED

APR 01 2010

IDAHO BOARD OF
TAX APPEALS

Date: March 31, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815
Voice (208) 772-2522

To: Idaho Board of Tax Appeals
3380 Americana Terrace, Suite 110
P. O. Box 83720
Boise, Idaho 83720-0088

Re: Notice of Appeal from Decision of the Tax Commission of the State of Idaho dated September 30, 2009, Docket Numbers: 21551 and 21552. A copy of the Decision is included.

Tax years being appealed: 1996, 1997, 1998, 2000, 2001, 2002, 2003 and 2004.

Now comes Philip Hart with this Appeal of a Decision of the State Tax Commission concerning docket numbers 21551 and 21552. This appeal is being filed on the ninetieth day from the receipt of the decision as the Decision was sent to the Appellant by way of certified mail and received on October 2, 2009. The Appellant is a member of the Idaho Legislature and the 91 days for which the Appellant has to respond was tolled by the for the duration of the 2010 legislative session which ended March 29, 2010. Please see the Idaho Constitution at Article III, section 7.

The Idaho Board of Tax Appeals has jurisdiction in accordance with Idaho Code 63-3049 as this is an appeal from a Decision of the State Tax Commission.

The issues for which Hart appeals are as follows:

Objection #1. The Idaho State Tax Commission's Notice of Deficiency Determination appears to be based on a federal Notice of Deficiency that was dated January 2, 2008. This federal Notice of Deficiency mandated a response date of April 1, 2008. This entire period of time fell within a period of time prohibited by the Idaho Constitution from serving Petitioner with a civil process.

The federal Notice of Deficiency was dated January 2, 2008 and pertained to years 1997, 1998, 1999, 2000, 2001, 2002 and 2003. The last day to file a petition with the United States Tax Court was April 1, 2008. The serving of this Notice of Deficiency and the requirement to

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petition tax court constitutes a "civil process" and is barred from being imposed on Mr. Hart during this time period as Mr. Hart is a member of Legislature and the constitutional provision found at Article III, section 8 applies which reads,

"Senators and representatives in all cases..., and shall not be liable to any civil process during the session of the legislature, or during the ten days next before the commencement thereof."

The 2008 session of the Legislature convened on January 7, 2008 and did not adjourn until April 2, 2008. The timing of the 2008 federal Notice of Deficiency fell wholly within this time period prohibited by the Idaho Constitution.

On August 25, 2006 an employee of the Internal Revenue Service handed Mr. Hart a summons as Mr. Hart walked into the House of Representatives chambers for the special session of the Legislature on that same date. I objected to that service of civil papers and the IRS re-served me on November 9, 2006 at their office in Coeur d'Alene, Idaho. The fact that the IRS re-served me this summons is evidence that the immunity provision found in the Idaho Constitution is effective. Exhibits will be provided.

On April 1, 2008 I also objected to the Notice of Deficiency dated January 2, 2008 by sending letters to the IRS in Denver, Colorado; Boise, Idaho; and Idaho Falls, Idaho. A written legal analysis of this argument will be provided by an Idaho licensed attorney.

Objection #2. The tax that the Idaho Notice of Deficiency Determination is attempting to collect is based entirely on a federal tax as defined by Title 26 of the United States Code. (See State Tax Commission Docket Numbers 21551 and 21552.) Taxes authorized by the United States Constitution include only apportioned direct taxes and uniform indirect taxes.

Therefore, since the Idaho tax piggybacks onto the federal tax, this tax must conform to the taxation authority of the Constitution of the United States of America. The tax in question is an unapportioned direct tax. The United States Supreme Court has ruled that there is no exemption to the apportionment requirement for direct taxes. Hence the tax has not been assessed by the federal government.

Objection #3. There is no assessment by the federal government for the collection of the tax for any of the years in question. A tax can not be collected unless it is first assessed.

I have made several attempts to obtain copies of the federal assessments made for taxes that I allegedly owe. The federal regulations are absolutely clear, there must be an assessment before a tax is due. And the taxpayer has a right to obtain a copy of this assessment.

26 CFR § 301.6203-1 Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment

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officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. **If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy** of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

Freedom of Information Act requests to the IRS for Individual Master File records, Substitute for Return records, IRS Form 13496, IRS Form 4549, IRS Form 886-A and any assessment records of any kind have not yielded any documents substantiating that an assessment has been made for the federal tax for the years in question. Further evidence of this claim will be provided.

As such, what can not be taxed because of the fundamental law must therefore be exempt. Section 83 of the Internal Revenue Code allows for this exemption.

"The plain language of section 83(a) belies Alves's argument. The statute applies to all property transferred in connection with the performance of services. No reference is made to the term "compensation." Nor is there any statutory requirement that the property have a fair market value in excess of the amount paid at the time of the transfer. Indeed, if Congress intended section 83(a) to apply solely to restricted stock used to compensate employees, it could have used much narrower language. Instead, Congress made section 83(a) applicable to all restricted "property," not just stock; to property transferred to "any person," not just to employees; and to property transferred "in connection with ... services" not just compensation for employment." Alves v. C.I.R., 734 F.2d 478 (1984).

Objection #4. The Idaho State Tax Commission's Notice of Deficiency Determination appears to be based on a federal Notice of Deficiency that was dated January 2, 2008. This federal Notice of Deficiency is based on an Examination Report dated October 16, 2007. This Examination Report contains multiple errors of such magnitude that the entire report should be impeached.

The examiner's report covers the years 1997 thru 2004, and is full of errors. For each of these years, the examiner asked me to re-file the returns, which I did. At one point all the returns were lost, and I had to file the original return twice. The examiner asked me to re-file because I had aggregated the revenue I received from engineering services and book sales. She wanted to separate the engineering services revenue from the book sales revenue as well as separate the related expenses. I did this and filed 1040X returns as requested.

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In the examination report, it appears that the examiner recognized the new 1040X figures for Schedule C expenses as the new expense figure was greater than the original expense figure. As such, the examiner allowed a greater deduction for the difference. Then the examiner added back as "income" the original Schedule C deduction plus the updated Schedule C deduction!!! The effect was to deny all deductions for all the years examined, even though I had supplied the examiner with over two bankers boxes full of documents and had spent 4 days with her in a personal interview.

As an example, I will address the years 1997 and 1998. The following were the revenue and expense figures I reported to the IRS in the returns for those years.

In 1997, working as an engineer I received payments for engineering services in the amount of \$128,145. Expenses that were incurred in generating this revenue from engineering services included payments to a subcontracting engineer of \$55,871, it included vehicle expenses of \$4,012, professional services of \$955, travel expenses of \$6,909, utility expenses of \$6,386, rent of \$2,600, bank charges of \$406 and office expenses of \$10,661. The total expenses were \$87,566. This yields a net revenue of \$40,558 before any exemptions, standard deductions or credits. Yet the examination report claims that the net revenue requires an upward adjustment of \$84,768 more than what I reported with no justifiable explanation.

In 1998, continuing to work as an engineer I received payments for engineering services in the amount of \$64,711. Expenses that were incurred in generating this revenue for engineering services included vehicle expenses of \$2,793, professional services of \$2,123, travel expense of \$9,370, utility expense of \$313, expenses related to the writing and publishing of a book of \$6,250, and office expenses of \$14,378. The total expenses were \$36,227. This yields a net revenue of \$28,484 before any exemptions, standard deductions or credits. Yet the examination report claims that the net revenue requires an upward adjustment of \$29,168 more than what I reported with no justifiable explanation.

An analysis of the IRS examination report by a forensic accountant will be provided showing the repeated errors made by the IRS in preparation of their report.

Objection #5. The current Idaho income tax is not the same tax that the Idaho Supreme Court had rendered an opinion on in 1932 with their *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932). That tax was not married to, nor piggybacked onto the federal income tax.

Today there is no question that the Idaho state income tax is premised upon and directly connected to the federal income tax. This is perfectly clear just simply from an examination of Idaho Code §§ 63-3002 and 63-3004. Further, §63-3030 imposes a requirement to file a state income tax return upon the very same class of individuals who are required to file federal income tax returns under 26 U.S.C., §6012. Apparently, those who are required to file federal income tax returns must also file Idaho income tax returns if they are residents of Idaho.

APR 01 2010

IDAHO BOARD OF
TAX APPEALS

The current Idaho state income tax laws are "piggybacked" upon the similar federal income tax laws and thus it is essential to briefly mention the constitutional foundation for those laws, and compare them to the constitutional restraints applicable to state taxes. The federal government has two great powers of taxation: it may impose direct taxes, but those taxes must be apportioned. It may likewise impose indirect taxes, but those taxes must be uniform; see *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895); and *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 36 S.Ct. 236 (1916).

A different and perhaps almost opposite rule prevails within the states and especially Idaho. Via Idaho Constitution Art. 7, §5, direct property taxes must be uniform, which is the rule applicable to indirect taxes at the federal level. Because these rules for taxation are different and even antagonistic between the federal government and the states, serious problems will undoubtedly arise whenever any attempt is made to connect some state taxes to a particular federal tax. If Congress imposes a direct federal tax via apportionment, a state tax tied to this federal one would be in serious doubt if the state rule for the imposition of a direct property tax was that it be uniform. Herein lies the problem for the Idaho state income tax laws. The deciding factor is whether §63-3080 is constitutional under the current tax scheme which connects the state tax to the federal. A more full analysis of this argument will be provided.

For all the reasons stated above, the State Tax Commission should withdraw their September 4, 2008 Notice of Deficiency Determination. Appellee will provide additional argument, exhibits and reports to substantiate the above claims.

Signed:

Philip Hart

date

Proof of Service

I hereby certify that today, March 31, 2010, I served the forgoing Notice of Appeal on the State Tax Commission by way of first class mail, postage prepaid.

Philip Hart March 31 2010
Philip Hart date

RECEIVED

APR 01 2010

IDAHO BOARD OF
TAX APPEALS



STATE OF IDAHO

(208) 334-3354
FAX 334-4060

BOARD OF TAX APPEALS

Office Address: Suite 110
3380 Americana Terrace
Boise, Idaho 83706
Mailing Address: P.O. Box 83720
Boise, Idaho 83720-0088

April 5, 2010

Philip Hart
2900 Government Way #262
Coeur d'Alene ID 83815

Re: **Appeal No. 10-B-1289**
Docket Nos. 21551 and 21552

Dear Philip Hart:

This letter will acknowledge receipt of an appeal filed on March 31, 2010, from the decision of the Idaho State Tax Commission.

As per Idaho Code § 63-3049, an appeal may be filed with this Board within ninety-one (91) days after the receipt of notice of the Decision of the State Tax Commission. Subsection (b) of the statute, requires that twenty percent (20%) of the amount asserted must be deposited with the tax commission before a taxpayer may seek review with this Board.

The Board can not determine whether your appeal has been perfected.

Please provide the following information within 14 days, or by **April 19, 2010**, otherwise the appeal may be dismissed.

1. Proof that both the filing requirement and twenty percent (20%) pre-pay requirement were met within the statutory ninety-one (91) days. (Idaho Code § 63-3049)
2. Please provide the date of receipt and a copy of the Tax Commission Decision you are appealing.
3. A statement of the amount in dispute.

63-3049. JUDICIAL REVIEW. (a) Redetermination by the state tax commission may be reviewed in the district court for Ada county or the county in which the taxpayer resides or has his principal office or place of business by a complaint filed by the taxpayer against the state tax commission within ninety-one (91) days after the receipt of notice of the

decision of the state tax commission denying, in whole or in part, any protest of the taxpayer or, within the same period, by filing an appeal with the board of tax appeals. Upon the serving of summons upon the state tax commission the case shall proceed as other civil cases but may be heard by the judge in chambers. If the case is appealed to the board of tax appeals, the hearing before that body shall proceed as set forth in the act creating such board. If the court finds that any tax is due, it shall enter judgment for such tax, including any interest or penalties that may also be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment. In the case of sales or use tax and corporate income tax decisions by the state tax commission, when the amount asserted exceeds twenty-five thousand dollars (\$25,000), no appeal to the board of tax appeals shall be allowed.

(b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

No act, order or proceeding of the tax commission shall be valid until after the time allowed for taking such court action has expired or such court action is finally determined. As used in this section, the term "amount asserted" shall mean the total amount due, as set forth in the decision of the state tax commission.

Enclosed is information regarding the Board's statutes and rules, Suggestions for Appearance, and three brochures.

When the appeal has been perfected, a hearing will be scheduled within 90 days of the date of this letter. All parties will be notified in writing of the date, time and place of the hearing. If you have any questions, please contact this office.

Sincerely,



Susan Renfro
Director and Clerk to the Board

Enclosures

cc: Idaho State Tax Commission

Visit our web site at www.bta.idaho.gov

Notice of Appeal to the Board of Tax Appeals

April 9, 2010

RECEIVED

APR 12 2010

IDAHO BOARD OF
TAX APPEALS

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

Dear State Tax Commission:

Please find enclosed a deposit check of \$1,962.36 which will bring the total amount deposited for the appeal of the above docket numbers to \$11,424.40.

Please send a receipt for the enclosed check, and for the \$7,862.04 and \$1,600.00 checks that I sent to your office last week. You may send the receipts to my above address.

Sincerely,


Philip Hart

PHILIP L. HART
c/o 2900 GOVERNMENT WAY, #262
COEUR D'ALENE, ID 83815

4402

92-373/1231

DATE April 9 10

PAY
TO THE
ORDER OF

State of Idaho

\$ 1962.36

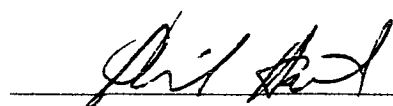
Nineteen hundred sixty two & 36/100

DOLLARS

IDAHO INDEPENDENT BANK
912 NORTHWEST BOULEVARD
COEUR D'ALENE, IDAHO 83814

ALL RIGHTS RESERVED

FOR _____



MP

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SAFETY

Hart

2900 Government Way #262

Coeur d'Alene, Idaho 83815

SPOKANE WA 990

09 APR 2010 PM 4 T

10th Census
Mail It Back



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APR 12 2010

IDAHO BOARD OF
TAX APPEALS

Board of Tax Appeals

P.O. Box 83720

Boise Idaho 83720

Richard L. Hart

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: **ORIGINAL**

2011 JAN 24 AM 9:06

CLERK DISTRICT COURT

Patty Bailey
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant,

: CASE NO. CV 10-9226

vs.

: AFFIDAVIT OF PHIL HART
IN SUPPORT OF MOTION
FOR RECONSIDERATION

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,
Respondents.

:

STATE OF IDAHO)

County of *Kootenai* ss.

PHILIP L. HART being first duly sworn hereby states as follows:

1. I am over the age of 18 years, competent to testify, and make these statements upon personal knowledge;
2. I am the appellant in this matter;
3. Attached hereto as Exhibit A is a copy of the Notice of Appeal to the Idaho Board of Tax Appeals that I filed with the State Tax Commission and the Idaho Board of Tax Appeals in case Docket numbers 21551 and 21552 respectively. I personally placed this Notice of Appeal in the United States Postal Service mail with postage prepaid thereon to both the State Tax Commission and the Idaho Board of Tax Appeals on March 30, 2010, the date which is reflected on the postmark of the envelope hereto as Exhibit B. I also filed the two checks, in the respective sums of \$7,862.04 and

1 AFFIDAVIT OF PHIL HART

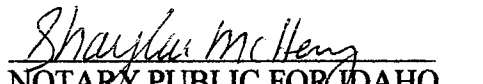
\$1,600.00, referenced in Exhibit A with the State Tax Commission. As reflected in Exhibit A I also gave my promise, as a promissory note, to pay the remaining \$1,962.36 by April 9, 2010. The two checks and the promise to pay were solely for the total amount of the 20% bond required to file appeals from both of the two case Dockets.

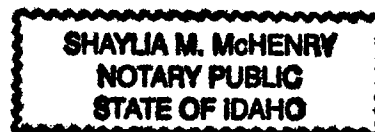
4. In compliance with Exhibit A, I provided further information pertinent to the appeal of the two case Dockets, 21551 and 21552, on March 31, 2010 when I placed it in the United States Postal Service mail with postage prepaid thereon, as contained in Exhibit C attached hereto;
5. I received the letter from the Idaho Board of Tax Appeals dated April 5, 2010, attached hereto as Exhibit D. I don't recall the actual date that I received it;
6. Attached hereto as Exhibit E is a copy of the letter and check, in full satisfaction of my promise to pay contained in Exhibit A, that I placed in the United States Postal Service mail with postage prepaid thereon on April 9, 2010 as reflected by the postmark thereon;
7. I was never advised by either the State Tax Commission that the two checks and promise to pay did not comply with their rules until the State Tax Commission filed its motion to dismiss the appeal of both of the two case Dockets until my receipt of its motion dated April 15, 2010. I do not recall the actual date that I received this motion.
8. Neither the State Tax Commission nor the Idaho Board of Tax Appeals has returned the \$11,424.40 that I posted for the purpose of the 20% total bond to appeal both case Dockets.

DATED this 23 day of January, 2011.


Philip L. Hart

SUBSCRIBED AND SWORN to before me the undersigned Notary Public on the 23 day of January, 2011.


NOTARY PUBLIC FOR IDAHO
Residing at Kootenai County
My Commission Expires: 8/7/2012



RECEIVED

MAR 31 2010

IDAHO BOARD OF
TAX APPEALS**Notice of Appeal to the Board of Tax Appeals**

March 30, 2010

From: Philip L. Hart
2900 Government Way, #262
Coeur d'Alene, Idaho 83815

To: State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83722

Board of Tax Appeals
P. O. Box 83720
Boise, Idaho 83720-0088

Appeal to the Board of Tax Appeals for Dockets numbers 21551 and 21552.

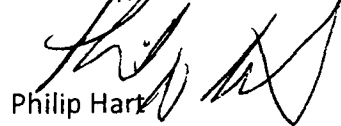
Dear State Tax Commission:

Please find enclosed a deposit of \$7,862.04 and \$1,600.00 to cover the twenty percent cash deposit required by Idaho Code 63-3049 (b). The amount of the alleged deficiency for these two docket numbers is \$27,609 plus \$24,518. Twenty percent of this amount is \$11,424.40.

Please consider this letter my promise to pay the remaining \$1,962.36. I am a member of the Legislature and have been in Boise since early January, except for weekends. I need to return home to the Coeur d'Alene area and be there during business hours in order to send the remaining \$1,962.36 to your office. The Legislature adjourned yesterday, and I expect to be back home by the end of this week. By April 9th I can have a check in the mail to your office for the remaining \$1,962.36.

The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the State Tax Commission

Sincerely,


Philip Hart

WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, IDAHO 83722
TELEPHONE (208) 334-7544
[ISB #2671]

Attorney for the Idaho State Tax Commission

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 1 SS

2011 FEB -7 AM 10:23

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,	)	SUPPLEMENTAL RESPONSE TO
	)	APPELLANT'S MOTION FOR
-vs-	)	RECONSIDERATION
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS)	
)	
Respondents.)	
)	

Comes now Respondent and supplements its response of December 17, 2010, to Appellant's motion for reconsideration:

Appellant in his motion for reconsideration, and in the briefing submitted in support thereof, has raised a myriad of issues, most of which have no bearing on the issue before this Court.¹ The issue before this Court is whether it should reconsider and reverse its dismissal of Appellant's appeal of the dismissal by the Board of Tax Appeals for lack of jurisdiction. It is Respondent's position that the Court's decision of December 17, 2010, is correct and that the decision dismissing Appellant's case for lack of jurisdiction should stand.

¹ It is worth noting that many of the positions now being taken by Appellant are issues that were never presented to the Board of Tax Appeals. As such, pursuant to Idaho Code § 63-3812(c), they are not proper subjects of an appeal even if this court had jurisdiction to hear this appeal.

In deciding this case, the Court should consider the relevant statutes and apply the limited procedural facts and timeline of this case to those statutes. The essential facts of the case are uncontroverted. First, the Idaho State Tax Commission issued a decision on redetermination of Appellant's tax liability as set forth in the Notice of Deficiency Determination on September 30, 2009. Appellant received a copy of that decision on October 2, 2009. Appellant took no action until March 30, 2010, when he mailed a notice of appeal of the September 30 decision with the Idaho Board of Tax Appeals. Also on March 30, 2010, Appellant mailed a partial payment to the Idaho State Tax Commission which did not equal 20 percent of the liability and interest set forth in the September 30, 2009, decision. On April 9, 2010, Appellant mailed to the Idaho State Tax Commission a check for \$1962.36 which was received on Tuesday, April 13, 2010. This check together with the partial payment made on March 30, 2010, totals 20 percent of the tax liability and interest set forth in the decision of September 30, 2009.

The requirements for obtaining a review of an Idaho State Tax Commission decision on redetermination are set forth in Idaho code section 63-3049, which provides:

63-3049. JUDICIAL REVIEW. (a) Redetermination by the state tax commission may be reviewed in the district court for Ada county or the county in which the taxpayer resides or has his principal office or place of business by a complaint filed by the taxpayer against the state tax commission within ninety-one (91) days after the receipt of notice of the decision of the state tax commission denying, in whole or in part, any protest of the taxpayer or, within the same period, by filing an appeal with the board of tax appeals. Upon the serving of summons upon the state tax commission the case shall proceed as other civil cases but may be heard by the judge in chambers. If the case is appealed to the board of tax appeals, the hearing before that body shall proceed as set forth in the act creating such board. If the court finds that any tax is due, it shall enter judgment for such tax, including any interest or penalties that may also be due and owing, against the taxpayer. Any taxes, penalties or interest paid, found by the court to be in excess of that which can be legally assessed, shall be ordered refunded to the taxpayer with interest from the time of payment. In the case of sales or use tax and corporate income tax decisions by the state tax commission, when the amount asserted exceeds twenty-five thousand dollars (\$25,000), no appeal to the board of tax appeals shall be allowed.

(b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

No act, order or proceeding of the tax commission shall be valid until after the time allowed for taking such court action has expired or such court action is finally determined. As used in this section, the term "amount asserted" shall mean the total amount due, as set forth in the decision of the state tax commission.

(c) Any party to the proceedings may appeal to the supreme court from the judgment of the district court under the rules and regulations prescribed for appeals. If the appeal be taken by the state tax commission, it shall not be required to give any undertaking or to make any deposits to secure the cost of such appeal or to secure the payment of any amounts ordered refunded by the court.

(d) Whenever it appears to the court that:

- (1) Proceedings before it have been instituted or maintained by a party primarily for delay; or
 - (2) A party's position in such proceeding is frivolous or groundless; or
 - (3) A party unreasonably failed to pursue available administrative remedies;
- the court, in its discretion, may require the party which did not prevail to pay to the prevailing party costs, expenses and attorney's fees.

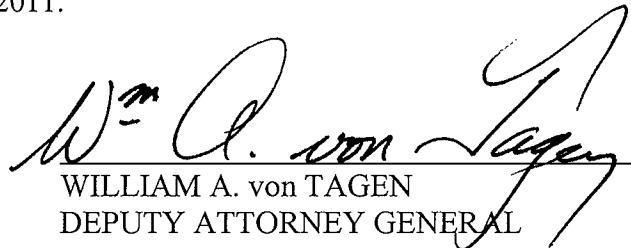
(Emphasis added)

In summary, what the statute requires is a timely appeal made within 91 days of the date Appellant received the notice of the Idaho State Tax Commission decision and further that Appellant pay 20 percent of the total amount due as set forth in the decision within the same time period. As the above statement of uncontroverted facts makes clear, neither of these very simple requirements was met. For this reason, the Board of Tax Appeals dismissed Appellant's appeal to that board. Appellant is now seeking judicial review of the dismissal by the Board of Tax Appeals.

Neither the Board of Tax Appeals nor this Court has any jurisdiction over the appeal because of the failure of Appellant to comply with the clear provisions of Idaho Code section 63-3049. For the board or this Court to have jurisdiction would require a timely appeal and payment of the 20 percent of the liability assessed in the decision. As noted above, Appellant received the decision on October 2, 2009. Ninety-one days lapsed on Friday, January 1, 2010.

Because January 1 is a holiday, Appellant had until the next working day in which to file his appeal of the Idaho State Tax Commission decision on the redetermination. The next working day was Monday, January 4, 2010. No appeal was filed by that date and 20 percent of the tax liability due was not paid by that date. A notice of appeal was finally mailed to the Board of Tax Appeals, and partial payment was mailed to the Idaho State Tax Commission on March 30, 2010. The entire 20 percent was not received by the Idaho State Tax Commission until April 13, 2010. All of this happened more than six months from the date of the Idaho State Tax Commission's decision. By no stretch of the imagination can be Appellant's appeal be regarded as timely. This court was correct in dismissing Appellant's appeal for lack of jurisdiction.

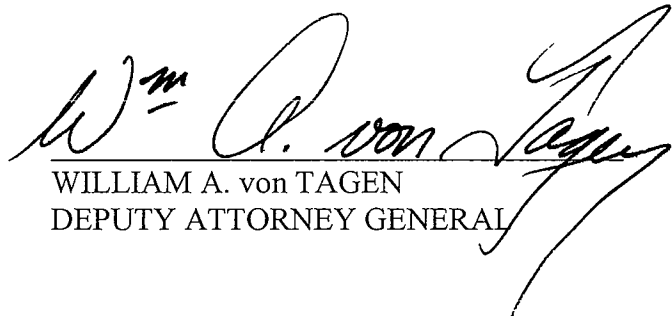
DATED this 4th day of February 2011.


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 4th day of February 2011, served a copy of the within and foregoing SUPPLEMENTAL RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION by sending the same by United States mail, postage prepaid, in an envelope to:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: #296 deb

2011 FEB 15 PM 1:04

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

CLERK DISTRICT COURT

DEPUTY

Attorney for Mr. Hart

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART, : CASE NO. CV 10-9226
Appellant,
vs. : APPELLANT'S SUPPLEMENTAL
: REPLY TO RESPONDENTS'
: SUPPLEMENTAL RESPONSE ON
IDAHO STATE TAX COMMISSION and : APPELLANTS MOTION FOR
IDAHO BOARD OF TAX APPEALS. : RECONSIDERATION
Respondents.

COMES NOW Appellant Phil Hart, by and through his counsel, and Replies to Respondents' "Supplemental Response" dated February 4, 2011.

INTRODUCTION

The Court's decision, from which reconsideration is sought, identified the Respondents' Motion to Dismiss as a "facial"¹ challenge to jurisdiction. However in analyzing this narrow challenge the Court erroneously applied the test applicable to a "factual" challenge to jurisdiction.² In proceeding with a "factual" test the Court used the record filed by the IBTA as proof of established facts to base its decision on. The IBTA's record is not proof. The IBTA's record is not the required new record in this appeal. The IBTA's record is a "mere articulation of

¹ In reviewing a "facial" challenge to jurisdiction a court is to look only the pleadings. *Young v. City of Ketchum*, 137 Idaho 102, 44 P. 3d 1157 (2002).

² In reviewing a "factual" challenge to jurisdiction a court determines the jurisdictional issue after an evidentiary hearing that provides the court with a basis to determine "facts." see *Anderson v. Gailey*, 97 Idaho 813, 555 P. 2d 144 (Idaho 1976); *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P. 3d 455 (2005); *Osborn v. United States*, 918 F. 2d 724 (8th Cir. 1990); *Crawford v. United States*, 796 F. 2d 924 (7th Cir. 1986); *United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 147 F. 3d 821 (9th Cir. 1998).

1 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

Respondents' position." *see Gracie, LLC v. Idaho State Tax Commission*, 149 Idaho 570, 237 P. 3d 1196 (Idaho 2010).

The Court's decision specifically acknowledges that Mr. Hart's appeal to this Court was provided for by statute, and that Mr. Hart's appeal to this Court was timely filed. (Mem. Dec. p. 7). These findings conclude a court's determination of a "facial" challenge to jurisdiction.³

The Respondents' "supplemental response" fails to even address, and proceeds to ignore, the distinction between "facial" and "factual" challenges to jurisdiction. Respondents continue attempting to mislead the Court, yet again, into conducting a "factual" determination of jurisdiction without any established facts. Respondents are not deterred by the complete absence of any established facts. Respondents continue to direct the Court to what they refer to as "procedural facts"⁴, "essential facts"⁵, and "uncontroverted facts."⁶

Respondents prior argument, based upon an appeal filing date of March 31, 2010 and "facts", is utterly without merit. Their most current argument contained in their "supplemental response" merely tries to redirect, and misdirect, the Court to undertake further consideration of "facts" in the context of an issue that neither IBTA decision nor the Court, addressed. Both the IBTA decision and the Court's Memorandum Decision were based on the clearly erroneous determination that Mr. Hart filed his appeals on March 31, 2010. This time around Respondents, once again, try to utilize what they refer to as "procedural facts", "essential facts", and "uncontroverted facts" to support a "facial" challenge to jurisdiction. Respondents argue that Mr. Hart's appeals to the IBTA are solely governed by the 91 day time period set forth in Idaho Code § 63-3049. Respondents don't mention Article III, Section 7 of the Idaho Constitution or its impact on this 91 day period. The IBTA assumed *arguendo* that Article III, Section 7 applied but erroneously claimed that March 31, 2010 was the date of the filing of Mr. Hart's appeals.

The Court's Memorandum Decision specifically identifies that one of Appellant's preliminary issues on appeal is "applicability of, and compliance with, Article III, Section 7 of the Idaho Constitution." (Mem. Dec. p. 1.) The Court can not enter findings of fact, or fail to

³ These findings inherently establish "subject matter" jurisdiction. Idaho Code § 63-3812 specifically grants a taxpayer, aggrieved by a decision of the IBTA, the right to appeal to the district court. This statute provides this Court with subject matter jurisdiction.

⁴ Respondents' Supplemental Response p. 2

⁵ Respondents' Supplemental Response, p. 2

⁶ Respondents' Supplemental Response, p. 3

2 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

address Article III, Section 7 of the Idaho Constitution, without facts established in a "new record." Only after a new factual record is established and proper briefing submitted, will the Court procedurally be in a position to consider a decision on the applicability of Article III, Section 7 of the Idaho Constitution.⁷

The fundamental point is that, at this point in the proceedings and on Respondents "facial" challenge to jurisdiction, there are no facts. Under a "facial" challenge test the Court is to only look to the pleadings. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P. 3d 1157, 1159 (2002).⁸ That is why it is referred to as a "facial" challenge to jurisdiction.⁹

ARGUMENT

⁷ This is the whole point of what Appellant's counsel was attempting to address with the Court in written and oral argument at the original hearing. The Court by erroneously adopting the IBTA record as established fact caustically accused Appellant's counsel of presenting a "circular, wholly unsupported claim." (Mem. Dec. p. 8) Counsel's original argument was premised upon the belief that the Court would (1) recognize that the challenge was "facial" and (2) would only review the pleadings in deciding the "facial" challenge. Appellant's Counsel's argument focused on the fundamental premise of law that a court always has jurisdiction to determine whether it has jurisdiction. In proceedings, where "facial" jurisdiction is obvious from the pleadings, if the court addresses jurisdiction further it must hold a hearing so that the facts can be established, a record established, and facts determined. The Court's assertion that Appellant's counsel seeks a trial *de novo* based on a circular argument that the Court can use new evidence "to get around the jurisdictional issues" is unwarranted. Appellant's counsel has never argued that "new evidence can be presented in a trial *de novo*...to get around the jurisdictional issues." Appellant's counsel attempted to clarify for the Court that a "facial" challenge is based solely on the pleadings. Appellant's counsel attempted to clarify for the Court that for a consideration of any other challenge to jurisdiction ("factual") that a "new record", is necessary. The salient point of Appellant's counsel's argument was that "new evidence" was required before the Court could get to the jurisdictional issue. Only after an evidentiary hearing is held, and proof of facts introduced into evidence, is the Court in the position to enter findings of fact and determine the applicability of Article III, Section 7 of the Idaho Constitution. *The Court's determination that Appellant's counsel's argument is "an attempt to deceive this Court" is likewise unwarranted. Appellant's counsel has never engaged in an "attempt to deceive this Court."* The truth, as reflected even by the IBTA record, is just to the contrary. It is Respondents who have deceived the Court (1) by failing to candidly acknowledge to this Court that Mr. Hart's appeal was "filed" on March 30, 2010; (2) by failing to candidly acknowledge to this Court that the date of filing of Mr. Hart's appeal was *not* the date of its receipt of the appeal (March 31, 2010); and (3) by their submission of affidavits in support of their "facial" challenge to jurisdiction and then their reliance on the same affidavits in the IBTA record that are unquestionably false. This deception continues through their latest argument. Appellant's counsel has focused clear and concise argument on the "facial" jurisdictional issue, the need for a "new record" for a "factual" jurisdictional review, and the failure of the IBTA to follow, let alone acknowledge, its own rules of procedure.

⁸ It is inherently inconsistent for the Court to grant Appellant's motion to strike the affidavits of Shelley Sheridan and Kristine Gambee filed by Respondents and then for the Court to rely upon literally the same affidavits contained in the IBTA's record to find "facts" upon which to base a determination on a "facial" challenge to jurisdiction.

⁹ As stated in footnote 4 to Mr. Hart's Reply to Respondents' Response to Motion for Reconsideration, at page 9 thereof, the Affidavit of Phil Hart was filed not as a waiver of the law that the IBTA's record is nothing more than a mere articulation of their position. Mr. Hart's affidavit is merely offered to point out to the Court that the "facts" found by the IBTA, and contained in the affidavits of Shelley Sheridan and Kristine Gambee, (given the Court's obvious review and reliance thereon) are not even supported by documents contained in its own record, or its own rules of procedure.

3 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

The Court must reconsider its decision. The Court must apply a "facial" test to jurisdiction. The Court's Memorandum Decision finds that there is "facial" jurisdiction. The Court must enter its order denying the motion to dismiss currently before it for determination. This Court has jurisdiction based upon its "facial" review of the pleadings that led to the Court's acknowledgment that Mr. Hart followed statutory procedure in filing this appeal and that this appeal to this Court was timely.

In Respondents' "supplemental response" they represent that:

1. The Court should "apply the limited procedural facts..."
2. "The essential facts of the case are uncontroverted."
3. "As the above statement of uncontroverted facts makes clear..."

The Respondents continued representation that there are "facts" of any nature before this Court for it to consider, in ruling on their "facial" challenge to this Court's jurisdiction, is totally without merit. There are no facts before this Court. The "new record" required by IRCP Rule 84 (c) has not been established. The Court's review of the pleadings properly found that Appellant fully complied with the statutory procedure applicable to this appeal, and that this appeal was timely filed.

PROCEDURE

It is respectfully submitted that the Court should proceed as follows:

1. Reconsider its Memorandum Decision; and then
2. Enter its Order reaffirming that Appellant Hart's "appeal is specifically provided for by statute and his appeal to this Court was timely" (Mem. Dec. p. 7); holding that the Court has subject matter jurisdiction; and deny Respondents' Motion to Dismiss as not supported by its "facial" challenge to this Court's jurisdiction.

CONCLUSION

The Court's Memorandum Decision, and disparaging remarks directed to Appellant's counsel, were obviously based upon what it perceived to be "established facts" based upon the affidavits of Shelley Sheridan and Kristine Gambee contained in the IBTA record, and because the IBTA decision accepted those affidavits as true. From the Court's perspective, believing that the filing date was March 31, 2010, it is understandable how the Court could be led to believe

4 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

that Appellant's counsel's argument "lacks any cogent legal argument."¹⁰ However, when it is recognized (if the Court is going to consider the IBTA record) that Mr. Hart's appeals were filed on March 30, 2010 and that Mr. Hart fully perfected his appeal of Docket number 21552 on April 9, 2010, ten days before the IBTA rules required, what was once an argument lacking in any cogent legal argument suddenly becomes sound and cogent. Likewise once the Court recognizes the truth regarding the date of filing of Mr. Hart's appeals it will become readily clear to it that Appellant's counsel did *not* "misrepresent" the holdings of *Ag Air* and *Smith*.¹¹ Further once the Court recognizes the truth regarding the date of the filings of Mr. Hart's appeals it will also become readily clear to the Court that Appellant's counsel *did*, in fact, "read the Smith decision." The impact of the Court's unquestioning acceptance of the erroneous date of March 31, 2010, as being the filing date of Mr. Hart's appeals, was of dramatic importance in the Court's decision. For example:

1. "On March 31, 2010, Hart filed his appeal with the Idaho Board of Tax Appeals..." (Mem. Dec. p. 4)
2. "The IBTA found Hart's appeal untimely pursuant to I.C. § 63-6049 and (it) stated:
...Appellant filed his appeal on March 31, 2010. Even more compelling is Appellants failure to fulfill the 20% pre-pay requirement until April 14, 2010...On its face it appears Appellant's appeal was untimely filed on both counts. The Board is without jurisdiction to hear this appeal." (Mem. Dec. p. 4)
3. "...in the present case, Hart failed to timely file his appeal with the IBTA, thereby divesting both the IBTA and this Court of subject matter jurisdiction." (Mem. Dec. p. 7)
4. "...even if Hart's Article III Section 7 argument for tolling of the deadline for filing his appeal were apt, his Appeal was nonetheless untimely." (Mem. Dec. p. 7)
5. "...it was Hart who disregarded the time limitation Hart had within which to perfect Hart's appeal. It was Hart's decision alone to fail to timely perfect his own appeal. That fact and that fact alone is what caused the IBTA to lack jurisdiction to hear his appeal, and which now causes this Court to lack jurisdiction to hear Hart's appeal from the IBTA decision which decided that it lack jurisdiction." (Mem. Dec. p. 9)

¹⁰ Mem. Dec. p. 8

¹¹ Mem. Dec. p. 10

6. "Hart fails to accept responsibility for Hart's own disregard of the time limitation in which Hart had to perfect his appeal." (Mem. Dec. p. 9)
7. "The *only* reason the IBTA lacked jurisdiction to hear the appeal from the Commission is because Hart failed to timely file his appeal with the IBTA." (Mem. Dec. p. 10, emphasis in opinion)

At this point in these proceedings it is clear that:

- (a) The Court rather than reviewing the motion to dismiss under a "facial" review, undertook a "factual" review;
- (b) There is no factual evidentiary record before the Court upon which it can undertake a "factual" review;

At this point in the proceedings it is obvious, although it is not a part of any evidentiary record before the Court, that:

- (a) Mr. Hart filed his appeal of Docket number 21551 on March 30, 2010;
- (b) Mr. Hart filed the total 20% bond required to appeal Docket number 21551 on March 30, 2010;
- (c) Mr. Hart filed his appeal of Docket number 21552 on March 30, 2010;
- (d) Mr. Hart filed the majority of the 20% bond (with a promise to pay the balance on by April 9, 2010) required to appeal Docket number 21552 on March 30, 2010;
- (e) The IBTA notified Mr. Hart by letter dated April 5, 2010 that it had a question as to whether he had perfected his appeal of both Docket number 21551 and Docket number 21552;
- (f) Under IBTA rule (IDAPA 36.01.01.048) if the IBTA upon inspection of any notice of appeal finds the appeal to be "materially defective or not substantially in compliance" the appellant "shall have fourteen (14) days to amend and perfect such appeal."
- (g) Mr. Hart, in fulfillment of his promise, filed the remaining portion of the 20% bond required to appeal Docket number 21552 on April 9, 2010. This was ten (10) days prior to the expiration of the time which he had to perfect his appeal of Docket number 21552, under IDAPA 36.01.01.048.

6 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

It is likewise obvious, from the written and oral argument submitted to this Court on Respondents' "facial" challenge to this Court's jurisdiction, that Respondents have:

- (a) Attempted, and continue to attempt, to mislead the Court to erroneously consider and adopt portions of, but not all of, the IBTA record as established fact in determining a "facial" challenge to jurisdiction;
- (b) Attempted to deceive the Court into believing that it should consider, and adopt, the statements contained in the Affidavits of Shelley Sheridan and Kristine Gambee (contained in the IBTA record) as being true in their representations, that Mr. Hart filed his appeals on March 31, 2010, when IBTA rule IDAPA 36.01.01.51 specifically provides that papers "shall be deemed filed as of the federal post office postmark date" and when the IBTA record contains the envelope, in which Mr. Hart's notice of appeals was mailed, that clearly displays, for all to see, a federal postmark date of March 30, 2010;
- (c) Attempted to deceive the Court into believing that Mr. Hart did not fully and completely file his 20% bond required for his appeal of Docket 21551 on March 30, 2010;
- (d) Attempted to deceive the Court into believing that Mr. Hart did not fully and completely file his total 20% bond required for his appeal of Docket 21552 on April 9, 2010;
- (e) Attempted to deceive the Court by *sub silentio* failing to concede to the Court that under the IBTA Rule IDAPA 36.01.01.048 that Mr. Hart had fourteen (14) days from the IBTA letter dated April 5, 2010 within which to perfect his appeal of Docket number 21552 and that Mr. Hart did perfect his appeal in Docket number 21552 on April 9, 2010 by depositing the balance of the 20% bond on Docket number 21552 in the mail as reflected by the letter and envelope contained in the IBTA record bearing the federal post office postmark date of April 9, 2010.
- (f) Attempting to have the Court affirm the clearly erroneous decision of the IBTA that holds that Mr. Hart's appeal was filed on March 31, 2010.

7 APPELLANT'S SUPPLEMENTAL REPLY TO DEFENDANTS' SUPPLEMENTAL RESPONSE

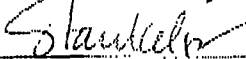
- (g) Attempting to have the Court overlook the IBTA rule that provides any taxpayer an additional fourteen (14) days, after notice from the IBTA, to "perfect" an appeal.

It is one thing for a quasi judicial body such as the IBTA to make a mistake regarding its own rules and procedures. Such mistakes can and do happen. That is why there are appeals from such bodies. It is quite another thing for that same quasi judicial body, through its counsel¹², to fail to quickly and readily admit, concede, and correct clearly erroneous findings of fact and the failure of the quasi judicial body to follow its own governing rules.

In this case the failure of the IBTA to correctly apply its own rules, the IBTA's affirmative adoption of and then submittal to the Court of affidavits containing obviously false representations as to the filing date of Mr. Hart's appeals, and the IBTA's presentation of written and oral argument to the Court that fails to admit, concede, and correct the obvious errors in the decision of the IBTA concerning the date of Mr. Hart's filing of his appeals from both Docket numbers and the date of Mr. Hart's perfection of his appeal of Docket number 21552 is unprecedented. The failures and actions of the IBTA have forced Mr. Hart to appeal its decision to this Court, to subject Mr. Hart to having to incur attorney fees and costs in prosecuting his appeal from the IBTA's clearly erroneous decision, and subjected Mr. Hart, and his counsel, to unprecedented upbraiding by the Court in its decision that was widely circulated, through media reporting, across the entire state. The failures and actions of the IBTA represent a breach of the trust of, and its fiduciary duty to, all Idaho taxpayers.

This Court must reconsider its Memorandum Decision and enter its Order denying the Respondents' Motion to Dismiss that is based on a "facial" challenge to this Court's jurisdiction.

DATED this 15th day of February, 2011.


Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tagen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on February 15, 2011.


Starr Kelso

¹² This obligation is even more fundamental, if that is possible, when the Office of the Attorney General represents the quasi judicial body that is asserting what are obviously false, and totally unsupportable, findings of fact that are in blatant disregard of the body's own rules.

STARR KELSO
 Attorney at Law #2445
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 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: #297 del

2011 FEB 15 PM 1:05

CLERK DISTRICT COURT

Shari K
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,	:	CASE NO. CV 10-9226
Appellant,		
	:	REPLY TO RESPONDENTS'
vs.	:	MOTION TO STRIKE AND OBJECTION
	:	TO APPELLANTS REQUEST FOR
IDAHO STATE TAX COMMISSION and	:	PRODUCTION
IDAHO BOARD OF TAX APPEALS,	:	
Respondents.	:	

COMES NOW Appellant Phil Hart, by and through his counsel, and Replies to Respondents' Motion to Strike and Objection to Appellant's Request for Production dated January 7, 2011.

Appellant has not served a "Request for Production" on Respondents. "Requests for Admission" were served on Respondents. The Respondents have encouraged the Court to and it has, undertaken a "factual" review of the jurisdictional question raised by Respondents' "facial" challenge to this Court's jurisdiction.

Appellant does not agree with the use of a "factual" review on the Respondents' "facial" challenge. However, it is what it is and must be addressed. As a result "Requests for Admission" were forwarded to Respondents to clarify, what is already obvious, the record regarding the date of the filing of Mr. Hart's appeals with the IBTA and the payment of the bond for Docket number 21551 and Docket number 21552.

If the Court is going to continue to review the "facial" jurisdictional determination under a "factual" standard there needs to be facts in the "new record." Currently there are no facts in the record. As the Court is aware under a Motion for Reconsideration the moving party may submit

1 REPLY TO MOTION TO STRIKE AND OBJECTION TO APPELLANT'S REQUEST
 FOR PRODUCTION

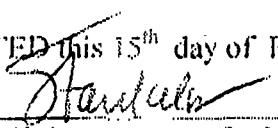
for the Court's consideration "new or additional facts". *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P. 2d 1026 (1990).

With regard to the pending Motion for Reconsideration the Respondents represent to the Court, once again, that the hearing involves a question of law "which this court will result *by referring to the record before the court* and applying Idaho law." (emphasis added, see Respondents' Mem. p. 2). To reiterate, there is no "record before the court" to refer to. The Court does not refer to any "record" when considering a "facial" challenge to jurisdiction. (see Appellant's briefs filed in support of the Motion for Reconsideration and Appellant's Supplemental Response)

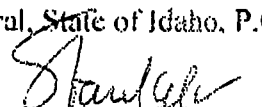
If the Court limits itself to a review of the pleadings in its review of the "facial" challenge to jurisdiction, the Respondents' answers to the requests for admission are not required. If, Respondents convince the Court to proceed with a "factual" review and not the proper "facial" review, the requests for admission are required so that the blatantly erroneous "facts" found by the IBTA, concerning the date of filing of Mr. Hart's appeals of Docket number 21551 and Docket number 21552 (actually March 30, 2010) and the date of Mr. Hart's "perfection" of his appeal of Docket number 21552 (actually April 9, 2010), are clarified.

Obviously, the "right" thing for the Respondents to do is for them to simply admit to the Court that the IBTA decision, based upon its own record, is erroneous in its findings regarding the filing dates. So far Respondents have avoided their fundamental responsibility to admit to the Court the erroneous findings and thus, to the extent that the Court continues with a "factual" review based upon the IBTA record, the Respondents' answers are required.

DATED this 15th day of February, 2011.


Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tegen, Deputy Attorney General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on February 15, 2011.


Starr Kelso

2 REPLY TO MOTION TO STRIKE AND OBJECTION TO APPELLANT'S REQUEST FOR PRODUCTION

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
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 Tel: 208-765-3260
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Attorney for Mr. Hart

STATE OF IDAHO
 COUNTY OF KOOTENAI
 FILED: JSS

2011 MAR -8 AM 10:46

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,

: CASE NO. CV 10-9226

vs.

AMENDED
: NOTICE OF HEARING

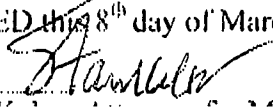
IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS. :
 Respondents.

TO: RESPONDENTS IDAHO STATE TAX COMMISSION AND IDAHO BOARD OF
 TAX APPEALS, and your attorney, William A. von Tagen, Deputy Attorney General.

YOU ARE HEREBY NOTIFIED that the hearing on Appellant Hart's Motion for
 Reconsideration has been rescheduled due to the inability of Representative Hart to be absent
 from his legislative duties on the previously scheduled date.

YOU ARE HEREBY NOTIFIED that the hearing on Appellant Hart's Motion for
 Reconsideration will be held on May 31, 2011 at 4:00 p.m. before Judge John T. Mitchell,
 Kootenai County Courthouse, 501 Government Way, Coeur d'Alene, Idaho.

DATED this 8th day of March, 2011.


 Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was mailed to William A. von Tagen, Deputy Attorney
 General, State of Idaho, P.O. Box 36, Boise, Idaho 83722 on March 8, 2011.


 Starr Kelso

AMENDED NOTICE OF HEARING ON MOTION FOR RECONSIDERATION

WILLIAM A. von TAGEN
 DEPUTY ATTORNEY GENERAL
 STATE OF IDAHO
 P.O. BOX 36
 BOISE, IDAHO 83722
 TELEPHONE (208) 334-7544
 [ISB #2671]

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

2011 MAR 10 PM 2:24

CLERK DISTRICT COURT
Mally Rosenbusch
 DEPUTY

Attorney for the Idaho State Tax Commission

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,	)	CASE NO. CV 10-9226
)	
Appellant,)	
	)	OBJECTION TO APPELLANT'S
-VS-	)	AMENDED NOTICE OF HEARING
)	
IDAHO STATE TAX COMMISSION and)	
IDAHO BOARD OF TAX APPEALS)	
)	
Respondents.)	
)	

COMES NOW respondent, Idaho State Tax Commission, and objects to Appellant's Amended Notice of Hearing dated March 8, 2011, and request that this court entering order reestablishing the hearing on respondents' motion for reconsideration for March 17, 2011.

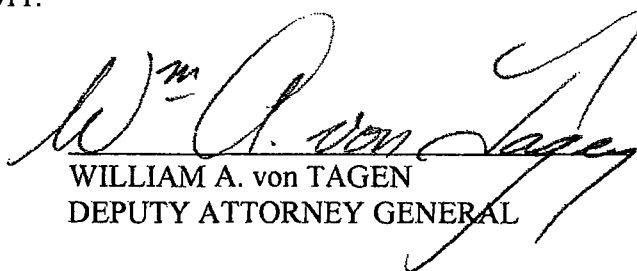
Appellant is seeking reconsideration of this court's Memorandum Decision and Order of December 8, 2010. Appellant's Motion for Reconsideration of this court's Decision is dated December 14, 2010. His notice of hearing for that motion is dated December 16, 2010. Respondent believes that Appellant is simply attempting to delay the entry of a final decision and judgment in this matter and that Appellant's behavior is consistent with delay tactics used when this matter was before the Idaho State Tax Commission and before the state Board of Tax

Appeals. There is no reason why respondent should have to wait nearly 6 months after the entry of the original Order to learn whether that Order is final.

If Appellant is not satisfied with simply having his counsel represent him before the court, there are certainly alternatives, such as allowing Appellant to be present at the hearing via telephone. Respondent notes that the March 16, 2011, hearing will commence at 5:00 p.m. MDT which should accommodate Appellant's participation by telephone.

Respondent asks that the hearing scheduled for March 16, 2011, go forward as originally scheduled and waives hearing on this objection, instead asking the court decide this matter as quickly as possible.

DATED this 10th day of March 2011.

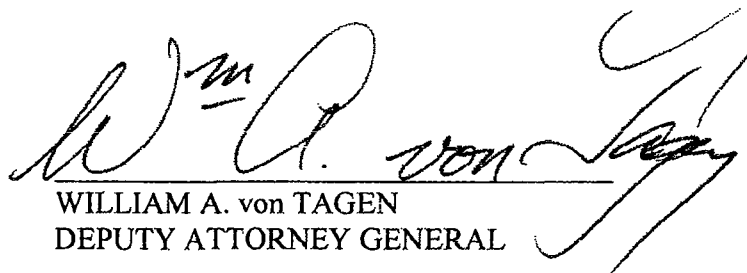


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 10th day of March 2011, served a copy of the within and foregoing SUPPLEMENTAL RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION by sending the same by United States mail, postage prepaid, in an envelope to:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312

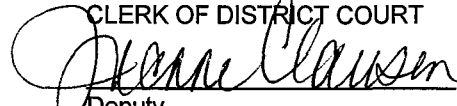


WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

STATE OF IDAHO)
County of KOOTENAI)ss

FILED 3-11-11

AT 12:40 o'clock A M
CLERK OF DISTRICT COURT


Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Appellant,

vs.

IDAHO STATE TAX COMMISSION AND
IDAHO BOARD OF TAX APPEALS,

Respondent.

Case No. **CV 2010 9226**

**ORDER REGARDING
MARCH 16, 2011, HEARING**

This matter is before the Court on respondent Idaho State Tax Commission and Idaho Board of Tax Appeals' (IBTA) "Objection to Appellant's Amended Notice of Hearing" filed March 10, 2011.

On December 16, 2010, appellant Philip Hart (Hart) filed "Motion for Reconsideration Pursuant to IRCP Rule 11(a)(2)(B)" and a "Notice of Hearing" on Hart's "Motion for Reconsideration", scheduling such for oral argument on March 16, 2011. The motion for reconsideration contained a request for oral argument, in compliance with I.R.C.P. 7(b)(3)(C). Neither the Notice of Hearing nor the motion contained a request or notice of intent to present any testimony at the hearing. Subsequently, both parties have filed briefing and an affidavit of Hart was filed.

On March 8, 2011, eight days before the scheduled hearing, Hart filed an "Amended Notice of Hearing" purporting to unilaterally "reschedule" the hearing on Hart's Motion for Reconsideration for May 31, 2011, "due to the inability of

Representative Hart to be absent from his legislative duties on the previously scheduled date.” Amended Notice of Hearing on Motion for Reconsideration, p. 1. No affidavit by Hart was filed supporting his counsel’s claim that Hart would be absent from his legislative duties in order to attend the hearing. No reason has been stated by Hart’s counsel as to why Hart would be required to be present for a purely legal [ie., non factual, non testimonial] oral argument by Hart’s attorney. On March 10, 2011, counsel for IBTA filed an “Objection to Appellant’s Amended Notice of Hearing”, claiming Hart “...is simply attempting to delay the entry of a final decision and judgment in this matter and that Appellant’s [Hart] behavior is consistent with delay tactics used when this matter was before the Idaho State Tax Commission and before the state Board of Tax Appeals.” Objection to Appellant’s Amended Notice of Hearing, pp. 1-2. The IBTA’s objection continues:

There is no reason why respondent [IBTA] should have to wait nearly 6 months after the entry of the original Order to learn whether that Order is final.

If Appellant [Hart] is not satisfied with simply having his counsel represent him before the court, there are certainly alternatives, such as allowing Appellant [Hart] to be present at the hearing via telephone. Respondent [IBTA] notes that the March 16, 2011, hearing will commence at 5:00 p.m. MDT which should accommodate Appellant’s [Hart] participation by telephone.

Id., p. 2. IBTA cites no rule or case law for its argument in its objection.

Hart misunderstands the Idaho Rules of Civil Procedure. By filing his Motion for Reconsideration, and Notice of Hearing on such motion, Hart has placed that matter before the Court and on the Court’s calendar for a hearing on March 16, 2011. Moving that hearing is a *procedural* matter which is now largely, if not completely, out of Hart’s control. Even if the IBTA stipulated to a rescheduled hearing date, such a stipulation would not be binding on the Court. In other words, the Court has to agree. Idaho Rule of Civil Procedure 6(e)(3) reads in pertinent part:

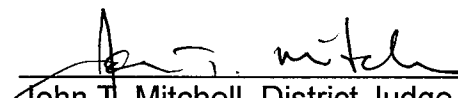
Stipulations not binding on court – Continuance of trial or hearing.

The parties to any action may present to the court a stipulation as to any procedural matter involved in any proceeding, including a stipulation to vacate or continue a hearing or trial, but such stipulation shall be considered as a joint motion by the parties to the court for its consideration, and shall not be binding upon the court.

In the present case, Hart has neither the stipulation from IBTA, nor the approval of the Court. Indeed, the Court at any time up to the day before any scheduled hearing, may decide a motion *without any oral argument at all*. I.R.C.P. 7(b)(3)(D). Hart's unilateral rescheduling of the March 16, 2011, is without validity. The March 16, 2011, hearing will continue as scheduled.

IT IS HEREBY ORDERED IBTA's Objection to Appellant's Amended Notice of Hearing is SUSTAINED, Hart's Amended Notice of Hearing filed March 8, 2011, is of no effect, there will be no hearing on May 31, 2011, in this case, and the hearing scheduled for March 16, 2011, at 4:00 p.m. PST will remain as scheduled. Should Hart wish to listen to the hearing telephonically, he may do so, provided his counsel make arrangements with the Clerk of the Court.

Entered this 11th day of March, 2011.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 11 day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Starr Kelso

Fax #
208 664-6261 ✓

Lawyer
William A. von Tagen

Fax # 7844
(208) 334-2690 ✓

#9178
#9184


Jeanne Clausen, Deputy Clerk

STARR KELSO
 Attorney at Law #2445
 P.O. Box 1312
 Coeur d'Alene, Idaho 83816
 Tel: 208-765-3260
 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

2011 MAR 11 PM 1:00

CLERK DISTRICT COURT

Molly Benlusch
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,

: CASE NO. CV 10-9226

vs.

: REPLY TO RESPONDENTS'
 : OBJECTION TO AMENDED
 : NOTICE OF HEARING

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS,
 Respondents.

:

COMES NOW Appellant Phil Hart, by and through his counsel, and Replies to Respondents' Objection to Appellant's Amended Notice of Hearing.

INTRODUCTION

Appellant's Motion for Reconsideration was originally noticed for hearing on the first available date provided by the assistant of the Court. At the time of filing the initial notice of hearing it was hoped that Appellant's statutory and constitutional duties as an elected Idaho State Legislator for the 2011 session would be completed or that his duties would permit a mid week trip to Coeur d'Alene so that he could be present and attend the hearing. Upon consultation with Appellant his undersigned counsel was informed, due to the concentrated and hectic nature of his duties and obligations in the Legislature this ongoing session, that Appellant would not be able to be absent from the Legislature on the date initially scheduled for the hearing. As soon as possible, the morning after receiving the said information, Appellant's undersigned counsel contacted the Court's assistant to inquire into and obtain the Court's next earliest available dates for a hearing on this matter. Appellant's counsel was provided the dates of May 31, 2011 and June 7, 2011. Upon discussion with Appellant it was ascertained that unquestionably the current

1 REPLY TO RESPONDENTS' OBJECTION TO APPELLANT'S AMENDED NOTICE
 OF HEARING

legislative session would be concluded and thus Appellant would be able to be present on May 31, 2011. This was the earliest date provided and Appellant's counsel confirmed this date with the Court's assistant and filed and served the Amended Notice of Hearing.

As the Court is aware Appellant was present in Court at the hearing on Respondents' Motion to Dismiss held on December 7, 2011. Appellant wants to be present in court, at the time and date of his hearing on his motion for reconsideration. It is the opinion of Appellant's counsel that in order to effectively represent Appellant that it is necessary that Appellant be present in Court at the hearing so that Appellant will be able to provide him with information, comments, and observations. For example during the course of oral argument Appellant's counsel may be distracted by argument from opposing counsel or comments by the Court and as a result a point that Appellant feels should be addressed might be overlooked by his counsel. Appellant will be able to whisper a comment or write a note to his counsel regarding the matter, or any other matter Appellant deems important, if he is present in court with his counsel. Obviously that client-counsel interaction could not occur if Appellant participated by listening to the proceedings on an open conference call. While some lawyers feel that it is not necessary for their client(s) to be present in court during proceedings, it is Appellant's counsel practice to have his client(s) present in court at all times so that the client(s) may provide input that the client(s) believe is important for counsel to consider.

ARGUMENT

Appellant is entitled to have the hearing on his motion for reconsideration held on May 31, 2011 so that he will be able to attend in person. Appellant's inability to attend is not one of mere convenience. Appellant is performing his statutory and constitutional duties as an elected representative of the citizens of the State of Idaho. Appellant would have to disregard those duties and place his personal interests above his constituents and be absent from the Idaho Legislature, while it is in session, in order to be present at the hearing. There are two fundamental constitutional principles that require that Appellant not be compelled to be at a hearing in this matter while he is performing his statutory and constitutional duties as an Idaho Legislator, and that he be entitled to be personally present in court at the date and time of the hearing.

2 REPLY TO RESPONDENTS' OBJECTION TO APPELLANT'S AMENDED NOTICE OF HEARING

1. Article III, § 7 of the Idaho Constitution.

This Article clearly provides that "in all cases" an Idaho State legislator shall not be liable to any civil process during the session of the legislature.

This constitutional provision is self explanatory. Perhaps what is not self explanatory is that it is important not for the individual legislator but for the legislator's constituents. All legislators are sent to the Legislature to represent their constituents. The business of the state and a legislator's constituents is the priority of each legislator rather than the personal convenience of the individual legislator. Literally every Attorney General's opinion from states that have considered this constitutional provision have held that the purpose of this constitutional provision is not the protection of the individual legislator but rather its purpose is the protection of the interests of the legislator's constituents in having their elected representative present at the Legislature while it is in session and attending to their business. The Idaho Attorney General's Office has not issued an opinion on this constitutional provision. It is difficult to comprehend the Attorney General taking the position that it is more important that the hearing be held at the date and time that Appellant can not be present, due to Appellant's statutory and constitutional duties than, it is for the citizens to have their elected Representative present during the legislative session and attending to their business. A draconian perspective might suggest that the Attorney General is aware of a pending matter that will be brought on for a vote in the Idaho House of Representatives, during the time that Appellant would be required to be absent from the legislature in order to personally attend the hearing, and that the Attorney General, for whatever reason, believes that the Appellant would vote in a manner not consistent with the Attorney General's position.

2. Due Process Clause of the 14th Amendment to the United States Constitution.

The initial notice of hearing on the motion for reconsideration was scheduled for the first available date and time provided to Appellant's counsel by the Court's assistant. It was hoped that this date would work out. It was hoped that (1) the legislative session would be over by March 16, 2011, and/or (2) Appellant Hart's legislative schedule and duties would allow him to be absent from the legislature for the time necessary to travel to Coeur d'Alene from Boise, attend the hearing, and then travel back to Boise. As the date of the hearing drew closer it

3. REPLY TO RESPONDENTS' OBJECTION TO APPELLANT'S AMENDED NOTICE OF HEARING

became clear that Appellant would not be able to be absent from the legislature for the time necessary to personally attend the hearing, and thus the new date was obtained from the Court's assistant. The new hearing date was the scheduled for the earliest of the two options provided by the Court's assistant.

The Respondents' suggestion that Appellant could be "present at the hearing via telephone", while initially seemingly reasonable, entirely overlooks the most significant reason for a client being present and sitting next to his/her counsel, which is the ability to communicate with counsel during the hearing. A client listening in via telephone can not whisper thoughts and observation to counsel or pass counsel a note raising an important point or question. Certainly Respondents don't suggest that as the hearing progresses each time the client wants to communicate something to counsel that the client needs to interrupt the oral argument, request that counsel or the Court stop, and/or request that he/she be allowed to put the Court on hold so that a discussion can be held with counsel on another line or after the Court and opposing counsel vacate the courtroom. The presence of a client, any client, at a hearing that will impact a client's rights is not merely a procedural nicety. It is a substantive value to the client's counsel, and thus the client, in the counsel representing the client's interests.

Due Process is a flexible concept that varies with the particular situation. Courts must weigh several factors to determine what procedural protections the U.S. Constitution requires in a particular case.

1. The private interest affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used;
3. The State's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *see Kuna Boxing Club, Inc. v. Idaho Lottery Com'n*, 149 Idaho 94, 233, 25 (2009); *Bell v. Burson*, 91 S. Ct. 1586, 402 U.S. 535 (1971).

In the present case the interest being affected is the right of Appellant to protect his property rights under the 14th Amendment to the United States Constitution and Article 1 § 1 of the Idaho Constitution. The risk of an erroneous deprivation of Appellant of property is already clearly present in this proceeding by the determination of a facial challenge to jurisdiction under a factual challenge to jurisdiction test, and the err of the Respondents, that has been already

4 REPLY TO RESPONDENTS' OBJECTION TO APPELLANT'S AMENDED NOTICE OF HEARING

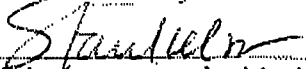
adopted by this Court on one occasion, in asserting that the date of the filing of Appellant's appeal was (the wrong date) March 31, 2010. Finally with regard to the third factor there has been no assertion, as well there could not be, of any fiscal and/or administrative burden that holding the hearing on May 31, 2011 will have on Respondents, or the Court.

There is, literally, no reason that the hearing should not be held on May 31, 2011. The bald allegations by Respondents that the scheduling of the amended hearing is "attempting to delay the entry of a final judgment" and a "delay tactic" do not hold water and frankly is beneath the dignity of argument that a representative of the Attorney General's Office should present to this Court. Indeed, as is made clear from the Appellant's argument in support of the motion for reconsideration, if Respondents had followed their own existing rules, regarding "filing date" and "perfecting an appeal", this matter would not even be before this Court at this time.

CONCLUSION

Not permitting the hearing to proceed as scheduled on May 31, 2011 serves no legitimate state purpose. At best Respondents' objection is a tacit admission that Appellant's motion for reconsideration should be granted, and their motion to dismiss denied, and thus the Appellant does not need personally attend and be able to communicate with his counsel. At worst, should the Court deny Appellant's right to be personally present and communicate with his counsel during the hearing, the Respondents' objection raises yet another constitutional issue that will have to be briefed and argued on appeal(s). The amended hearing date should be permitted.

DATED this 11 day of March, 2011.


Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was faxed to William A. von Tagen, Deputy Attorney General, State of Idaho, 208-334-7844, on March 11, 2011.


Starr Kelso

5 REPLY TO RESPONDENTS' OBJECTION TO APPELLANT'S AMENDED NOTICE OF HEARING

STARR KELSO
 Attorney at Law #2445
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 Coeur d'Alene, Idaho 83816
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 Fax: 208-664-6261

Attorney for Mr. Hart

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: *HA*

2011 MAR 14 PM 3:58

CLERK DISTRICT COURT

Mally Rosenbruch
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,

: CASE NO. CV 10-9226

vs.

: MOTION FOR RECONSIDERATION
 : OF ORDER REQUIRING HEARING
 : TO BE HELD ON MARCH 16, 2011

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS.
 Respondents.

:

:

COMES NOW Appellant Phil Hart, by and through his counsel, and hereby moves this Court for Reconsideration of its Order requiring Appellant's Motion for Reconsideration to be held on March 16, 2011 instead of the re-noticed date of May 31, 2011.

INTRODUCTION

On Sunday, March 6, 2011 at approximately 5:00 o'clock p.m. the undersigned counsel met with his client the Appellant Phil Hart. In reviewing his upcoming commitments and schedule as an elected Representative of the Idaho State Legislature it became obvious that he would not be able, as was originally hoped, to attend the hearing scheduled for March 16, 2011 in this matter. First thing in the morning on Monday March 7, 2011 the undersigned counsel pursuant to First Judicial District Local Rule 3 the undersigned counsel contacted this Court's assistant to inquire about alternative dates for the hearing and left a message. Upon later conversation with this Court's assistant the undersigned counsel was notified of the next two available dates on this Court's calendar. The assistant was advised that Appellant Hart would have to be contacted because of his duties in the Idaho Legislature. Contact with Appellant Hart was attempted by cell phone and e-mail. Because of his legislative duties Mr. Hart was not able

1 APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER
 REGARDING MARCH 16, 2011, HEARING

to respond until the late afternoon of March 7, 2011. Appellant Hart advised that the first day provided by this Court's assistant, May 31, 2011, was available. On March 8, 2011 the undersigned filed the Amended Notice of Hearing with the Court Clerk, copy to this Court in chambers, and mailed a copy to counsel for Respondents.

On March 10, 2011 by a fax bearing the time of 15:19:06 a copy of Respondents' "Objection to Appellant's Amended Notice of Hearing" was received in the office of Appellant's undersigned counsel. Undersigned counsel was in conference with other clients until approximately 6:00 o'clock p.m. on March 10, 2011 and did not see said objection until after that time on that date.

In an effort to respond in a timely fashion the undersigned prepared a five (5) page "Reply" to the objection. This was completed and faxed to this Court and Respondents' counsel the next day, March 11, 2011, at 1:00 o'clock p.m. Undersigned counsel then, feeling ill, left the office for the remainder of the day. Today, Monday March 14, 2011, the undersigned counsel while reviewing in "in box" communications observed for the first time that this Court had apparently faxed its Order granting Respondents' objection at 12:41 o'clock p.m. on March 11, 2011. Upon reviewing the Court's Order, and its fax time, with the "Reply" it is apparent from the "fax transmission times on the respective documents" that the Court prepared and faxed its Order to respective counsel prior to the Court's receipt of Appellant's "Reply."

Based upon the above, the "Reply to Respondents' Objection to Amended Notice of Hearing", and the Affidavit of Starr Kelso filed herewith it is respectfully requested that the Court reconsider its March 11, 2011 Order Regarding March 16, 2011, Hearing, and reschedule the hearing for the date provided by the Court's assistant, May 31, 2011.

DATED this 14th day of March, 2011.


Starr Kelso, Attorney for Mr. Hart

CERTIFICATE OF SERVICE: A copy was faxed to William A. von Tagen, Deputy Attorney General, State of Idaho, 208-334-7844, on March 14th, 2011.


Starr Kelso

2 APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011, HEARING"

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Attorney for Mr. Hart

STATE OF IDAHO }
 COUNTY OF KOOTENAI } SS
 FILED: #968

2011 MAR 14 PM 3:20

CLERK DISTRICT COURT

Mally Rosenbusch
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
 Appellant,
 SUPPORT OF

vs.

IDAHO STATE TAX COMMISSION and
 IDAHO BOARD OF TAX APPEALS,
 Respondents.

: CASE NO. CV 10-9226
 AFFIDAVIT OF STARR KELSO IN
 SUPPORT OF MOTION FOR
 RECONSIDERATION OF ORDER
 : REQUIRING HEARING TO BE
 HELD ON MARCH 16, 2011

STATE OF IDAHO)

ss.

County of Kootenai)

Starr Kelso, being first duly sworn upon oath, hereby states as follows:

1. I have been licensed to practice law in the State of Idaho since 1979 and I am the attorney for the Appellant, Philip L. Hart in this matter;
2. I am over the age of 18 years, competent to testify, and make this statement upon my personal knowledge and will so testify if required;
3. The initial Notice of Hearing on Appellant's Motion for Reconsideration was scheduled for the Court's first available date and time provided to me by Judge Mitchell's assistant. It was hoped that Appellant Hart's statutory and constitutional duties as an elected Representative to the Idaho State Legislature during the legislature's current session would possibly be completed by the date provided, March 16, 2011, or that the session would be "winding down" to such an extent that he would

1 AFFIDAVIT OF STARR KELSO IN SUPPORT OF APPELLANT'S MOTION FOR
 RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011,
 HEARING

be able to be absent from the legislature for the time necessary to travel from Boise to Coeur d'Alene, and back again to Boise, for the hearing;

4. The initial Notice of Hearing, nor motion, contained a request or notice of intent to present any testimony at the hearing. The hearing concerns a "facial challenge" to jurisdiction. Without waiving the proper procedure for evaluating a "facial challenge" to jurisdiction the Affidavit of Appellant Hart was filed regarding "factual" matters that were erroneous and which had been addressed and adopted by the Court in its decision granting Respondents' motion to dismiss.
5. On Sunday, March 6, 2011 at approximately 5:00 o'clock p.m. the undersigned counsel met with his client the Appellant Phil Hart. In reviewing his upcoming commitments and schedule as an elected Representative of the Idaho State Legislature it became obvious that he would not be able, as was originally hoped, to attend the hearing scheduled for March 16, 2011 in this matter;
6. First thing, approximately 9:05 o'clock a.m. in the morning on Monday March 7, 2011 the undersigned counsel pursuant to First Judicial District Local Rule 3 the undersigned counsel contacted this Court's assistant to inquire about alternative dates for the hearing and left a message on the answering machine;
7. Upon later contact, that same day, with this Court's assistant the undersigned counsel was notified the next two available dates on this Court's calendar were May 31st and June 7th. The Court's assistant was advised that Appellant Hart would have to be contacted because of his duties in the Idaho Legislature to verify his ability to attend the hearing;
8. Contact with Appellant Hart was attempted by cell phone and e-mail. Because of his legislative duties Mr. Hart was not able to respond until the late in the afternoon of March 7, 2011. Appellant Hart advised me that the first day provided by this Court's assistant, May 31, 2011, was available;
9. On March 8, 2011 I filed the Amended Notice of Hearing with the Clerk, faxed a copy to this Court in chambers, and mailed a copy to counsel for Respondents;
10. On March 10, 2011 by a fax bearing the time of 15:19:06 a copy of Respondents' "Objection to Appellant's Amended Notice of Hearing" was received in my office. I

2 AFFIDAVIT OF STARR KELSO IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011, HEARING

was in conference with other clients until approximately 6:00 o'clock p.m. on March 10, 2011 and I did not see said objection until later that evening:

11. In an effort to respond in a timely fashion to the Objection I researched the issues involved and prepared a five (5) page "Reply" brief to the objection. This was completed and faxed to this Court and Respondents' counsel the next day, March 11, 2011, at 1:00 o'clock p.m. Since I was feeling ill, I left the office for the remainder of Friday after confirming the receipt of the fax by the Court and counsel for Respondent;
12. Today, Monday March 14, 2011, while reviewing "in box" communications, I observed for the first time that this Court had apparently faxed its Order granting Respondents' objection at 12:41 o'clock p.m. on March 11, 2011. Upon reviewing the Court's Order, and its fax time, with the "Reply" it is apparent from the "fax transmission times" on the respective documents that the Court prepared and faxed its Order to counsel of record prior to the Court's receipt of Appellant's "Reply:"
13. On March 10, 2011 through today I am without the services of my regular secretary. I was, and am, being assisted by a person who answers the telephone. Apparently this person, not appreciating the time sensitive nature of the Court's Order of March 11, 2011 and because of my effort to leave the office because I was ill, did not bring the faxed Order from the Court to my attention immediately upon its receipt;
14. In my haste to prepare the "Reply" and leave the office due to illness, and not being aware of the Court having already entered an Order on the objection, I erroneously presumed that the Court would wait for the "Reply" to be filed before entering an Order, and that the Court would accept my representations in the first two paragraphs of the "Reply", made by me as an "officer of the court", without the need of an affidavit. Upon review of the Court's Order today, it is obvious the "Reply" was not waited for and *ipso facto* the representations were not considered by the Court.
15. In my conversations with the Court's assistant it was my understanding that the assistant recognized that the new date being requested was for this case, that it involved Representative Hart, and the requested change of hearing date was properly obtained pursuant to this Court's procedures. I presumed that whatever internal procedures that this Court follows regarding its Calendar had been complied with and

3 AFFIDAVIT OF STARR KELSO IN SUPPORT OF APPELLANT'S MOTION FOR
RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011,
HEARING

that the Court, by the assistant's providing me with the two available dates and confirming May 31, 2011 had no objection to the rescheduling. I presumed that the Court's assistant was following whatever the Court's internal directions in this regard were as established;

16. I also, apparently erroneously, presumed that the Court would be aware in the normal course of matters to be aware that Appellant Hart is a duly elected Representative to the Idaho State Legislature and that the legislature was still in session. Since the legislature is in session it seemed obvious to me that in order for Appellant Hart to be personally present, and assist his counsel at the hearing to the extent he or his counsel deemed appropriate, that Appellant Hart would have to miss all or part of the legislative session on the 15th, 16th, and 17th of March;
17. That Appellant Hart wishes to be personally present in Court with his counsel when the Court hears argument on his motion for reconsideration.
18. It has been my practice as an attorney for over 30 years to advise my client(s) to be present in court whenever any matter concerning their interests is before a Judge for determination. Some clients, for whatever reason, have declined to follow my recommendation to be present, but the vast majority follow my recommendation and appear in court;
19. In my opinion it important that any client of mine be present in court when a matter is before a Judge for consideration that affects their interests. In my opinion it is important that the client observe first hand the proceedings of the court, arguments of counsel, and comments and/or decision of the Court. It is my opinion that it is of significant importance to me, as counsel representing my client, that my client be present in court at all times that a matter is before a Judge that affect their interests. Without fail during the course of the proceedings my client will communicate with me as the proceedings progress, either verbally or in writing, to convey questions, raise points that he/she feels should be addressed with the court but which I have not yet addressed, or raise a point(s) that he/she believes I may have missed due to being distracted by ongoing arguments of counsel and or comments by the court. In short it is of substantive value and assistance to me while representing a client in any proceeding

4 AFFIDAVIT OF STARR KELSO IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011, HEARING

with any court to have my client sitting next to me and able to readily convey his/her thoughts to me as the proceeding progresses.

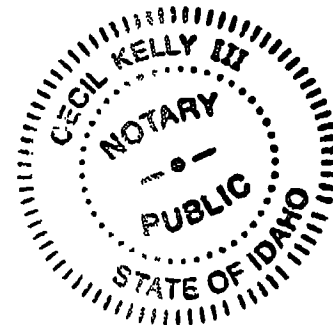
20. The unsworn allegations of Respondents' attorney that the rescheduling of the hearing is "attempting to delay the entry of a final judgment" and/or a "delay tactic" are totally without substance or merit. Appellant wishes the motion for reconsideration to be considered by the Court and he wants to be present in Court, to communicate with and assist his counsel, during the proceedings.

DATED this 14th day of March, 2011.

Starr Kelso
Starr Kelso

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, by Starr Kelso who is known to me and identified to me, on this 14 day of March, 2011.

Cecil Kelly III
NOTARY PUBLIC FOR IDAHO
Residing at Coeur d'Alene
My Commission expires: 5 Nov. 2015



CERTIFICATE OF SERVICE: A copy was faxed to William A. von Tagen, Deputy Attorney General, State of Idaho, 208-334-7844, on March 14th, 2011.

Starr Kelso
Starr Kelso

5 AFFIDAVIT OF STARR KELSO IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S "ORDER REGARDING MARCH 16, 2011. HEARING

Description	CV 2010-9226 PhilipHart vs. Idaho State Tax Commission 20110316 Motion to Reconsider Judge Mitchell Court Reporter Julie Foland Clerk Jeanne Clausen		
Date	3/16/2011	Location	1K-COURTROOM8
Time	Speaker	Note	
<u>04:23:53 PM</u>	Judge	Calls case - Mr. Kelson present for the pltf. Mr. VonTagen for the deft.	
<u>04:24:22 PM</u>	DA	I have had a change to review affd from Phil Hart.	
<u>04:24:39 PM</u>	Judge	Motion to reconsider my order regarding hearing today not being continued.	
<u>04:25:08 PM</u>	DA	Not going to raise an objection to timeliness. No reason to delay proceeding today.	
<u>04:25:38 PM</u>	PA	Motion to reconsider my order regarding todays hearing.	
<u>04:26:58 PM</u>	PA	Will provide my court with copy.	
<u>04:31:03 PM</u>	Judge	Read your affd Mr. Kelso and motion.	
<u>04:31:27 PM</u>	PA	<p>Note to court that this motion for reconsideration the earliest date was 3/16/11. Mr. Hart felt that legislation would be winding down or be over. On Monday call courts clerk to inquire next available date. Left message on machine and called back and advised the May 31st and June 7th dates were next available dates. Contacted my client and took the 5/31/11 date - noticed per rule. In response to that Thursday afternoon last week I received objection to counsel having hearing delayed to 5/31/11. Couldn't get to this until evening. Prepared response to that objection next day and also my affidavit. Went out to fax machine and personally faxed them to court's clerk and in chambers. I went home because I was ill. Looking thru stack of documents on Monday I noticed that there was an order entered by court on 3/11/11. Faxed to me at 12:40pm. Person got fax and didn't advise me. I was taken aback by quickness of order and that it was less than 24 hrs. and before I had an opportunity to reply. Responded by a motion for reconsideration. Mr. Hart was working on affd while at legislature. Having a client present isn't a convience. I want my client here observing and listening so that they can make comments to me. Mr. Hart can't be here today. Suggestion that Mr. Hart could participate by telephone conference. As hearing is progressing, client can't provide with comments. Didn't know if attorney general would be present. If deputy for atty general travel than it is much more important that my client be here. My client isn't just trying to prolong this hearing. Mr. Hart has consitutional obligations to the people he represents. Vote on Gun Bill today</p>	

		and people he represents would like him to be there. No prejudice claim. Need to proceed on the 5/31/11 that the court has given me. Fundamental fairness - makes sense and justice to allow this matter to proceed on 5/31/11 so that he can assist me.
<u>04:43:51 PM</u>	DA	Objects. Routine proceeding. No reason to delay. No need for testimony. Court has suggested some alternatives. Court isn't required to have hearing on this matter and can make rulings on pleadings.
<u>04:44:51 PM</u>	Judge	Deny motion to reconsider my order to deny continuance of motion to reconsider. Motions aren't evidentiary. Affidavit submitted by Mr. Hart. No need for any testimony so there is no need to continue to end of May. Motion to strike is next by Mr. Von Tagen.
<u>04:46:48 PM</u>	DA	Motion to strike - 1/10/11 request for admission. Didn't think it was a proper subject and stand on argument set forth in pleading.
<u>04:47:25 PM</u>	PA	Reply sets forth position adequately. Facial vs. factual channels of jurisdiction. Stay ruling on this motion pending on ruling of motion to reconsider. Issue is based upon the pleadings.
<u>04:48:33 PM</u>	DA	Nothing in response.
<u>04:48:38 PM</u>	Judge	That was in direction I was heading. Will take that under advisement. Motion to reconsider court's previous order. Several documents that have been read by court. Also read affd of Phil Hart.
<u>04:49:43 PM</u>	PA	The name of office of Atty General shakes the ground. I also aware that individuals have rights and that is focus of response of atty general. Mr. Hart should have this court reconsider the decision by this court. Complied with and timely filed his appeal. That is where divergence comes in. Court found facial jurisdiction and than switched to factual. Proper method is to proceed to evidentiary hearing. Agreed to my Atty General that date of filing was 3/30. ID Board of Tax determined date of filing was 3/31 and they ruled based upon this. Under their own rule and admission it was 3/30. 2 cases before Id Tax Commission and they were both filed on 30th. 20% of amount involved needed to be posted as a bond. The 1st one was met and 2nd majority was met along with promissory notes. Check for balance of #3 was on 4/9 post marked. 14 days to perfect appeal. Full amount of both seperate appeals was filed on 4/9. 14 days to perfect was on 4/19. Only use money for what that tax payer says. 40% bond on both of these appeals. They acknowledge receipt of 20%, but if not sufficient than why didn't they send it back to him? ID Tax Appeals - there needed to be consolidate for hearing and Mr. Hart didn't get notice of this. They neglected to consier there were to appeals. This matter shouldn't be before this court. Tax Board should've seen error. Filing was on 30th and they stand by 31st. If citizens can't place confidence to have agencies admit that they

		are wrong then system fails. Ask court reconsider order dismissing this matter based on facial. Have an evidentiary hearing to establish everthing I have just gone over.
<u>05:06:37 PM</u>	DA	Attorney general office or Tax Commission didn't have notification of postmark on appeal. IC 6349 - file appeal within time limit set and payment of 20% of tax due within time limits - that is what was before Tax Board Appeals. Courts decision was correct. Page 5 - Fairway Development Act. There are no new facts in this case. Everyone understands facts. Court decision was correct on 12/8/10.
<u>05:10:14 PM</u>	PA	Idaho Board of Tax Appeals - He filed his appeal on 3/31. Gracie tells us that record is articulation. Need to have an evidentiary hearing. There aren't any new facts. Ask that order be reconsidered and motion on facial jurisdiction be denied, factual jurisdictional issue than request an evidentiary hearing.
<u>05:12:19 PM</u>	Judge	Take this under advisement. Motion reconsider 12/8/10 and motion to strike by deft. Appreciate the arguments.
<u>05:12:50 PM</u>		
<u>05:12:50 PM</u>	End	

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#1112
STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2011 MAR 16 PM 1:28

STARR KELSO
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Fax: 208-664-6261

CLERK DISTRICT COURT

Patty Bailey
DEPUTY

Attorney for Mr. Hart

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,
Appellant,

: CASE NO. CV 10-9226

vs.

: AFFIDAVIT OF PHIL HART
IN SUPPORT OF MOTION
FOR RECONSIDERATION
OF ORDER REGARDING
MARCH 16, 2011 HEARING

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,
Respondents.

STATE OF IDAHO)
County of Ada) ss.

PHILIP L. HART being first duly sworn hereby states as follows:

1. I am over the age of 18 years, competent to testify, and make these statements upon personal knowledge;
2. I am the appellant in this matter;
3. I am the duly elected Idaho State Representative for Legislative District 3;
4. The Idaho Legislature commenced its 2011 session on January 10, 2011 and it is still in session;
5. Today, March 16, 2011, I am in Boise, Idaho attending to my duties as the elected Idaho State Representative for Legislative District 3;
6. When my motion for reconsideration in this matter was originally filed, and scheduled for a hearing on March 16, 2011, I believed that there was a possibility that the 2011

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OF ORDER REGARDING MARCH 16, 2011 HEARING

Legislative Session would be completed, that the session would be near its end, and/or the daily time pressures and duties would be diminished so that I could be away from the Legislature for the time necessary to travel to Coeur d'Alene and attend the hearing in person. It was my understanding that March 16, 2011 was the earliest available date for the Court, provided to my attorney by the Court, to hold a hearing on my motion for reconsideration. None of the possibilities that would allow me to attend the hearing on March 16, 2011, that I had hoped could possibly occur, have occurred. In fact I am finalizing this affidavit sitting at my desk on the floor of the House of Representatives while I am listening to (and discussing with others in person and on my "floor" phone) and participating in debate on the floor of the House of Representatives regarding proposed legislation to permit guns to be carried on college campuses. I also have three bills that in one manner or another I am sponsoring that are preparing to be heard in hearings and other legislation that I am attempting to draft;

7. Due to my legislative duties I have very limited time and opportunities to meet with, or even speak on the telephone, my attorney regarding this matter;
8. I was able to meet with my attorney on Sunday, March 6, 2011 at approximately 5:00 o'clock p.m. at his office in Coeur d'Alene while I was on my way through Coeur d'Alene driving back to Boise for the reconvening of the Legislature on Monday, March 7, 2011;
9. In reviewing the current Legislative progress it became clear to me that I would not be able to leave Boise, travel to Coeur d'Alene, attend the hearing scheduled for March 16th, and return to Boise without having to miss important matters and meetings as this Legislative session pushes towards votes on significant matters of importance to my constituents and ultimately the end of the session;
10. I was personally present at the only other hearing held in this matter and I want to be present at the hearing on the motion for reconsideration as well as any and all future proceedings before the Court. I was advised by my attorney that he would contact the Court to see if we could get the hearing date rescheduled for a different date so that I would be able to personally attend the hearing;

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OF ORDER REGARDING MARCH 16, 2011 HEARING

11. On Monday March 7, 2011, I was contacted by cell phone text message and e-mail by my attorney and informed that he had received two alternative dates for the hearing from the Court. They were May 31st and June 7th. I did not receive these messages until late in the day and I was not able to respond to my attorney until later that evening. I advised my attorney that the earlier of the two alternative days provided, May 31st, was a day that I could personally attend the hearing. It was agreed that an amended notice of hearing would be filed for that date. I was later contacted by my attorney and advised that the amended notice was filed and the hearing was scheduled for May 31st;
12. On either the evening of March 10th or the morning of March 11th I was advised by my attorney that the Attorney General's Office had filed an "objection" to the amended hearing date and that my attorney was preparing a response.
13. It is my understanding that the "objection" claimed the amended date was "simply attempting to delay the entry of a final decision" and that this "behavior is consistent with delay tactics used when this matter was before the Idaho State Tax Commission and before the Board of Tax Appeals." It is also my understanding that the Attorney General suggested in his "objection" that, if I wanted I could "be present at the hearing via telephone."
14. My requesting my attorney to seek an alternative date, his doing so, and his being given an amended date for the hearing by the Court was done for the sole purpose that I could be present in Court with my attorney at the hearing. I want to be present in Court. I believe it is important for me to be in Court at any proceeding involving my rights and property so that I can listen, observe, and either verbally or in writing communicate my thoughts as they arise during the hearing to my attorney on matters that I believe are importance and should be considered by my attorney when he presents oral argument to the Court, when the Attorney General argues his position, and in response to any questions or comments of the Court;
15. On March 14th I was informed by my attorney that the Court had upheld the Attorney General's "objection" and that it was requiring the hearing to be held on March 16th. I was advised by my attorney that unbeknownst to him the Court had entered its order

3 AFFIDAVIT OF PHIL HART IN SUPPORT OF MOTION FOR RECONSIDERATION
OF ORDER REGARDING MARCH 16, 2011 HEARING

and faxed it to him, on March 11th, before he was even able to fax his reply to the "objection". I am informed that the Court's order was entered less than 24 hours after the "objection" was received by my attorney and that due to my attorney being ill, leaving his office early in the afternoon of March 11th, and the fact that on that date he was without a "regular" secretary that he did not see the order of the Court until Monday morning, March 14th, when he got to the office;

16. My attorney advised me that he would file a request for reconsideration of the Court's order requiring the hearing to be held on March 16th and ask that the hearing be held on the alternative date of May 31, 2011. My attorney later advised me that he had filed a motion for reconsideration with a supporting affidavit, and filed a copy by fax with the court clerk and faxed a copy to the Court's chambers, at approximately 2:30 o'clock p.m. on March 14th.
17. My attorney advised me the evening of March 15th, and this morning, that no response had been received from the Court to the motion for reconsideration of the Court's order requiring the hearing to be held today, March 16, 2011, at 4:00 o'clock p.m.
18. Today, March 16, 2011, I am in Boise attending to my duties as a Legislator on behalf of my constituents. It is my understanding pursuant to Idaho House Rule 6 (a copy of which is attached hereto as Exhibit A) that I am bound to attend to my Legislative duties regardless of personal matters, short of an illness or other event that makes me unable to be in attendance, to be in attendance at the session.
19. There was literally no way that I would have known, or anticipated that without waiting for my attorney to file a reply to the "objection" of the Attorney General and less than 24 hours after the "objection" was received, by fax, in my attorney's office the afternoon of Friday March 11, 2011, the Court would enter its order and uphold the Attorney General's "objection" to the hearing being held on May 31, 2011 and require the hearing to be held on March 16, 2011.
20. There was literally no way that I would even have known about the Court's faxed order of March 11, 2011 before my attorney for the first time saw it on Monday, March 14, 2011.

4 AFFIDAVIT OF PHIL HART IN SUPPORT OF MOTION FOR RECONSIDERATION
OF ORDER REGARDING MARCH 16, 2011 HEARING

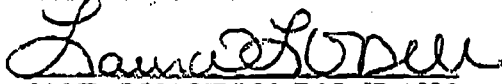
21. There was literally no way, given the Court's quick ruling on the Attorney General's "objection" that I would not have expected the Court to review and consider my attorney's motion for reconsideration, and affidavit stating specific good grounds in support thereof, in a similar timely fashion;
22. By the end of the day yesterday, March 15, 2011, even if I felt I could violate the trust of my constituents to be present at the Legislative session today, March 16, 2011, I would not do so. As noted, this affidavit is being prepared as I physically sit on the floor of the House of Representatives and the House is debating a very important piece of legislation which my constituents most certainly expect, and would demand, that I be present to vote on.
23. I want to be present in person at any hearing involving my personal rights and property and I would be present in Court, if I was not in Boise attending to my Legislative duties.
24. I do not understand how it would be practical, let alone possible, for me to effectively communicate with my attorney during any hearing held today before the Court by my listening into the proceedings via telephone conference call. Additionally, given my legislative duties I am not even able state with any reasonable degree of certainty where I might be, whether I might be in a committee meeting, what I might be doing, or whom I may be speaking to at 4:00 o'clock p.m. Pacific Standard time (5:00 o'clock p.m. Mountain Standard time) to even listen to the hearing on the telephone. In my opinion it would be an exercise in futility if listening in on the telephone is all that the Court will allow. I might just as well read what happened in a transcript prepared after the hearing. Needless to say my reading about what happened at the hearing, in a transcript, would not allow me to observe the proceedings and communicate my thoughts to my attorney as they occur and as the hearing progresses.
25. I request that the hearing not be held today. I request that the hearing be held on May 31, 2011, the alternate date that was provided to my attorney by the Court so that I could attend, so that I can be present in court at the hearing and listen, observe, and effectively and timely communicate with my counsel as the hearing proceeds.

DATED this 16 day of March, 2011.

5 AFFIDAVIT OF PHIL HART IN SUPPORT OF MOTION FOR RECONSIDERATION
OF ORDER REGARDING MARCH 16, 2011 HEARING


Philip L. Hart

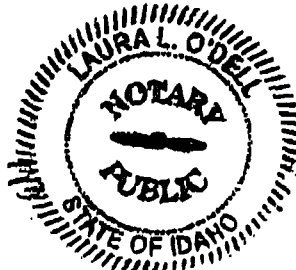
SUBSCRIBED AND SWORN to before me the undersigned Notary Public on the 16th day of March, 2011.



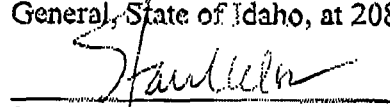
NOTARY PUBLIC FOR IDAHO

Residing at Bose, Idaho

My Commission Expires: May 7, 2011



CERTIFICATE OF SERVICE: A copy was faxed to William A. von Tagen, Deputy Attorney General, State of Idaho, at 208-334-2690, on March 16, 2011.


Starr Kelso

6 AFFIDAVIT OF PHIL HART IN SUPPORT OF MOTION FOR RECONSIDERATION
OF ORDER REGARDING MARCH 16, 2011 HEARING

KELSO LAW OFFICE

STARR KELSO
Attorney at Law

~

"There are evil men, and they are to be feared. However, the greatest evil we all face today is the indifference of good men!"

1621 N. THIRD STREET, SUITE 600
POST OFFICE BOX 1312
COEUR D'ALENE, ID 83816-1312
Telephone : (208)765-3260
Facsimile : (208)664-6261
E-Mail : starr.kelso@frontier.com

March 16, 2011

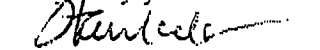
John T. Mitchell, District Court Judge
Via Fax: 446-1132

RE: Philip L. Hart v. Idaho State Tax Commission, et al.
Kootenai County Case No. CV 2010-9226

Dear Judge Mitchell:

I am faxing herewith the "chambers" copy of the "Affidavit of Phil Hart In Support of Motion For Reconsideration of Order Regarding March 16, 2011 Hearing" that was filed with the District Court Clerk today. I do not know if Mr. von Tegen intends on being present in court today at 4:00 o'clock p.m. or whether he intends on participating by telephone, as he suggested Mr. Hart should do. Therefore, I am faxing a copy to Mr. von Tegen to his office in Boise. I will bring a copy to court to deliver to him if he is present in court, in case his office has not provided him with a copy.

Very truly yours,



Starr Kelso
Attorney at Law
c: Mr. Hart
William A. von Tegen

STATE OF IDAHO)
County of KOOTENAI) ss
FILED 3-17-11
AT 12:50 O'Clock P. M
CLERK OF DISTRICT COURT
Libran [Signature]
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Appellant,

vs.

IDAHO STATE TAX COMMISSION AND
IDAHO BOARD OF TAX APPEALS,

Respondent.

Case No. **CV 2010 9226**

**ORDER DENYING APPELLANT
HART'S MOTION FOR
RECONSIDERATION,
AND ORDER GRANTING IBTA'S
MOTION TO STRIKE**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The Court has set forth the factual and procedural history of this case in its Memorandum Decision and Order Granting Respondents' Motion to Dismiss, filed December 8, 2010:

On October 22, 2010, [Philip] Hart [(Hart)] filed his Appeal from the Idaho Board of Tax Appeals (IBTA) in the District Court. Hart's preliminary issues on appeal include: applicability of, and compliance with, Article III, Section 7 of the Idaho Constitution; whether the Income Tax Audit Bureau's Notices of Deficiency amounted to an unapportioned direct tax; whether the deficiency notices issued by the federal government are valid evidence of taxes owed to the State of Idaho; and whether there was estoppel or waiver by respondent Idaho Tax Commission (Commission) of the twenty percent deposit requirement resulting from its acceptance of Hart's cash deposit and promise to pay, among other issues. *Id.*, pp. 2-5. On November 1, 2010, the Commission filed its Motion to Dismiss Hart's Appeal, along with the Memorandum in Support of Motion to Dismiss and the Affidavits of Shelley Sheridan and Kristine Gambee. [The Affidavit of Shelley Sheridan, filed November 1, 2010, purports to have five exhibits attached; however, the affidavit as filed with the Court has no attachments. The same affidavit, when filed as part of the agency

record, does have the exhibits referenced therein attached.] On November 18, 2010, Hart filed his "Appellant Hart's Motion to Strike the Affidavits of Kristine Gambée and Shelley Sheridan Pursuant to IRCP 12(f)" and "Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss." On November 19, 2010, the Commission/IBTA filed the "Notice of Filing of Agency Record." On December 2, 2010, the Commission filed its "Response to Appellant Hart's Reply to Defendants' 12(b)(1) Motion to Dismiss." On December 3, 2010, Hart filed his "Motion for I.R.C.P. Rule 11(a)(1) Sanctions." Oral argument on the Commission's motion to dismiss was held on December 7, 2010. At the conclusion of that hearing the Court took the matter under advisement. The above pleadings were reviewed by the Court and the Court has considered arguments of counsel at hearing.

Hart's motion to strike was heard at the December 7, 2010, hearing, and was granted. The information contained in the affidavits of Shelley Sheridan and Kristine Gambée, both filed on November 1, 2010, is stricken. However, the information contained in those affidavits is contained in the Notice of Filing of Agency Record, filed November 19, 2010. Hart's motion for sanctions was not noticed up for hearing.

December 8, 2010, Memorandum Decision and Order Granting Respondent's Motion to Dismiss, pp. 1-3. The Court granted respondent IBTA's motion to dismiss, determining it had no jurisdiction to hear appellant Hart's appeal. Hart then filed his motion for reconsideration on December 14, 2010, arguing his appeal to the IBTA had been filed on March 30, 2010, as opposed to the March 31, 2010, date claimed by the IBTA. Motion for Reconsideration, p. 1. Hart also argued his 20% appeal bond was proper, but that the requirement of a 20% appeal bond is unconstitutional. *Id.*, p. 2.

The IBTA responded to Hart's motion for reconsideration on December 20, 2010, and filed a Motion to Strike and Objection to Hart's Request for Production, and memorandum in support thereof, on January 10, 2011. On January 24, 2011, Hart filed his Reply to Respondents' Response to Motion for Reconsideration and an Affidavit of Phil Hart in Support of Motion for Reconsideration. The IBTA filed a Supplemental Response to Appellant's Motion for Reconsideration on February 7, 2011. And, on February 15, 2011, Hart filed his Supplemental Reply to Respondents' Supplemental Response on Appellant's Motion for Reconsideration and his Reply to Respondents'

Motion to Strike and Objection to Appellant's Request for Production.

On December 16, 2010, Hart noticed his motion for reconsideration for a hearing and oral argument scheduled for March 16, 2011. On March 8, 2011, eight days before that scheduled hearing, Hart filed an "Amended Notice of Hearing" purporting to unilaterally reschedule that hearing on Hart's motion for reconsideration to May 31, 2011. By order of the Court filed March 11, 2011, this Court required oral argument as originally scheduled on March 16, 2011. March 11, 2011, Order Regarding March 16, 2011, Hearing.

At the March 16, 2011, oral argument, this Court first heard argument by Hart's counsel, on Hart's "Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011." Hart filed that motion on March 14, 2011, along with an "Affidavit of Starr Kelso in Support of Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011." At the conclusion of oral argument on that motion on March 14, 2011, the Court denied Hart's "Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011."

The Court then heard argument on Hart's Motion for Reconsideration filed December 14, 2010, and the IBTA's Motion to Strike. At the conclusion of oral argument on those motions, the Court took those motions under advisement.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

/

III. ANALYSIS.

A. Hart's Motion for Reconsideration.

1. Introduction.

In his various filings, Hart makes varying arguments. Hart raises the issue of a 20% appeal bond being unconstitutional only once, in his motion for reconsideration filed December 14, 2010. Motion for Reconsideration Pursuant to I.R.C.P. 11(a)(2)(B), p. 2. In that motion Hart also argues he filed his Notice of Appeal with the IBTA on March 30, 2010, not March 31, 2010, as was claimed by the IBTA and found by this Court. *Id.*, p. 1. And, Hart argues he properly paid the 20% appeal bond by “deposit[ing] another type of security acceptable to the tax commission”. *Id.*, p. 2. Finally, with regard to the 20% appeal bond issue, Hart argues, “..since there were two matters appealed from[, Hart] at least complied with the full deposit of one of the matters appealed from.” *Id.* The IBTA responded by reiterating its previous arguments, made in relation to its Motion to Dismiss, filed November 1, 2010. Response to Appellant's Motion for Reconsideration, p. 1. Essentially, the IBTA argued this Court was without jurisdiction to hear Hart's appeal because of his failure to file a notice of appeal within 91 days as contemplated in Idaho Code § 63-3049. See Memorandum Decision and Order Granting Respondent's Motion to Dismiss, p. 5. And, to clarify, although Hart's Article III Section 7 argument was never directly dealt with by either the IBTA or this Court, both the IBTA and this Court recognized that, even if Hart's argument for the tolling of the deadline within which he was to file his appeal was proper, his appeal was nonetheless untimely. *Id.*, p. 7.

2. This Court's Standard of Review Regarding the Motion to Dismiss.

Hart alleges this Court utilized an incorrect standard of review in its ruling on the Commission's motion to dismiss. Reply to Respondents' Response to Motion for

Reconsideration, p. 3 *et seq.* It is Hart's contention that this Court conducted a facial review, rather than a factual one, in relying on matters outside the pleadings. *Id.*, p. 3. Hart states, "[u]tilization of a 'factual' determination on a IRCP Rule 12(b)(1) 'facial' challenge to jurisdictional [sic] is error." Reply to Respondents' Response to Motion for Reconsideration, p. 4. Hart goes on to argue this Court should have held an evidentiary hearing on the jurisdiction issue and it is Hart's position that it was "unforeseeable" that the Court:

...would preclude Mr. Hart from presenting evidence, at a trial or hearing before the Court proceeded with any factual determination let alone a determination of jurisdiction based upon a "factual" standard [sic] It was unforeseeable that the Court would identify the correct standard ("facial") but then apply an incorrect ("factual") standard.

Id., pp. 6-7. The IBTA has not responded to this argument by Hart.

In its decision on the IBTA's motion to dismiss, this Court wrote:

A motion to dismiss pursuant to I.R.C.P. 12(b)(1), which raises facial challenges to jurisdiction, is reviewed under a standard which mirrors the standard of review used under I.R.C.P. 12(b)(6). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 92005), citing *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). Thus, the Court looks only to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The question is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* On the other hand a factual challenge to jurisdiction will allow the court to go outside the pleadings without converting the motion into one for summary judgment. *Owsley*, 141 Idaho 129, 133, 106 P.3d 455 n. 1. This is a facial challenge to this Court's jurisdiction.

Memorandum Decision and Order Granting Respondents' Motion to Dismiss, p. 3. The Court granted Hart's motion to strike the affidavits of Shelley Sheridan and Kristine Gambee, noting that the information contained therein was also in the agency record filed on November 19, 2010. Hart never sought to strike the agency record. Importantly, this Court, throughout its decision, never makes reference to any substantive material referred

to in the stricken affidavits or the agency record. Contrary to Hart's contention, the Court did in fact limit itself to a review of the pleadings. See Reply to Respondents' Response to Motion for Reconsideration, p. 3. On pages 1-4 of this Court's decision, this Court set forth the factual and procedural history of the case, including citing dates on which pleadings were filed and on which hearings were held. Hart points to no evidence of this Court's utilization of a factual determination of the jurisdictional issue at bar, and he cannot. Nor does Hart cite the Court to any authority whatsoever establishing that consideration of dates on which pleadings were filed amounts to a factual determination under I.R.C.P. 12(b)(1). Hart now argues an evidentiary hearing may be requested by the IBTA, but that at this juncture, Hart's pleading (his Petition for Review) sets forth the undisputed facial jurisdiction. *Id.*, pp. 3-4. Hart can point to no purported evidence of this Court's "'factual' review of the challenge to its jurisdiction because the Court never engaged in such a factual inquiry. The Court did, however, determine as a matter of law that Hart's failure to satisfy the limitation of Idaho Code § 63-3049 resulted in this Court's being without jurisdiction to hear the case. Memorandum Decision and Order Granting Respondent's Motion to Dismiss, p. 9. It is precisely this Court's refusal to hear Hart's claim which supports the conclusion that this Court properly determined as a matter of law that it did not have jurisdiction to hear this case; the Court prohibited Hart from presenting substantive evidence regarding his underlying claim.

3. Hart's March 30, 2010, and March 31, 2010, Appeals.

As a preliminary matter, Hart continually references the agency record in his argument that his appeal of the Commission's determination to the IBTA was timely filed on March 30, 2010. Reply to Respondents' Response to Motion for Reconsideration, pp. 9 *et seq.* Presumably, Hart takes no issue with the Court's referring to the Agency Record in this regard, despite his claim two pages earlier in his brief that the record was

improperly considered by the Court, turning a facial challenge to jurisdiction into a factual one. *Id.*, p. 7. Again, as on the motion to dismiss previously heard by the Court, the Court's reference to the record is limited only to the dates on which pleadings were filed.

Hart argues the Commission is not only in error regarding the date on which his appeal was filed, Hart also goes so far as to claim the IBTA misrepresented facts to the Court and continues to "perpetuat[e] their prior misrepresentations to this Court." *Id.*, p. 9, *et seq.* Again, the IBTA does not directly address Hart's contentions in this regard. It is Hart's position that his appeal is deemed filed on the date of mailing as reflected by the postmark, he filed his Notice of Appeal on March 30, 2010, as evidenced by the postmark, and Hart's two checks amounted to "'substantial compliance' promise to pay the amount remaining on the *total* due for 20% of *both* Docket numbers (21551 and 21552)". *Id.*, p. 10. (italics in original). Hart's counsel reiterated this position at oral argument, stating the IBTA's behavior in this matter was "shocking."

In fact, Hart did author a one-page letter to the IBTA entitled "Notice of Appeal to the Board of Tax Appeals" on March 30, 2010; this letter was received by the IBTA on March 31, 2010. This letter discusses only the deposit of the 20% appeal bond, specifically setting forth Hart's inability to pay the full amount and offering to submit an additional check on a later date. The letter closes with the following: "The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the Tax Commission." Thereafter, on March 31, 2010, Hart filed his actual five-page "Notice of Appeal to the Idaho Board of Tax Appeals"; the Notice of Appeal was received by the IBTA on April 1, 2010. It is the March 31, 2010, Notice of Appeal to the Idaho Board of Tax Appeals which sets forth what is actually being appealed and what supports Hart's contentions.

A Notice of a State Tax Commission Appeal must contain certain items according to the Idaho Administrative Code (IDAPA). IDAPA 36.01.01.047 states:

In appeals brought under Section 63-3049, Idaho Code, the notice of appeal shall include:

- a) A copy of the redetermination or final decision by the State Tax Commission appealed from;
- b) The objections to the appellant to the redetermination or final decision;
- c) The basis for said objections;
- d) A statement of the amount in dispute shall be included with the notice of appeal if the amount in dispute is different from the redetermination or deficiency determination decision; and
- e) Proof of compliance with the mandatory deposit requirements as provided in Section 63-3049, Idaho Code, in the form of a receipt from the State Tax Commission.

IDAPA 36.01.01.47.01. These items must be filed with the IBTA within 91 days after receipt of the decision of the State Tax Commission. IDAPA 36.01.01.047.02. And, as to defective appeals, the Code states:

Upon the filing of any notice of appeal it will be inspected by the Board and if found to be materially defective or not substantially in compliance with the requirements of this chapter the Board may dismiss such appeal or require its amendment. After notice from the Board, the appellant shall have fourteen (14) days to amend and perfect such appeal. Failure to perfect the appeal may result in dismissal of the appeal without further notice.

IDAPA 36.01.01.048.01. Finally, the Code provides the IBTA with the option of holding a separate hearing on the question of jurisdiction "if a notice of appeal fails to set out allegations alleging jurisdiction of the Board." IDAPA 36.01.01.048.02.

Hart's contention that his Notice of Appeal was filed on March 30, 2010, is patently wrong. His letter dated March 30, 2010, in no way complied with the requirements of a State Tax Commission appeal. Simply entitling correspondence as a "Notice of Appeal to the Board of Tax Appeals" does not make it so. No portion of the March 30, 2010, letter complied with any requirements for an appeal: Hart made no reference to any copy of the Commission decision appealed from; Hart did not set forth any objections he had to

the decision; Hart did not set forth the basis for his objections; Hart did not state the amount in dispute; and Hart did not provide proof of compliance with the deposit requirements in the form of a receipt from the Commission. Thus, as found by the IBTA and this Court, Hart's March 31, 2010, Notice of Appeal, *is* his appeal. And, even in his March 31, 2010, untimely Notice of Appeal, Hart failed to provide the IBTA with a deposit receipt from the Commission.

Hart incorrectly argues that his deposit amount was proper at least as to the Docket Number 21551 appeal, and that he substantially complied with the deposit requirements for Docket Number 21552 via a combination of a partial deposit and a promise to pay on a later date. Reply to Respondents' Response to Motion for Reconsideration, p. 5. This argument entirely ignores the requirement of IDAPA 36.01.01.0047.01(e); that is, Hart failed to provide *proof of compliance* with deposit requirements. Hart simply presumed the IBTA would accept partial payment and a purported promise to pay (along with an entirely deficient March 30, 2010, Notice of Appeal) and there is no evidence that Hart ever sought a receipt from the Commission. This cannot be said to amount to substantial compliance.

Hart goes on to assume the IBTA had some obligation to "notify or advise" Hart that his piecemeal noncompliant deposit "was not permissible as a 'type of security acceptable to the tax commission.'" *Id.*, p. 11. This argument evinces Hart's ignoring the language of IDAPA 36.01.01.048.01; where an appeal is materially defective or not in substantial compliance with requirements, the IBTA has the option of dismissing the appeal or of providing an additional 14 days for the appellant to amend and perfect the appeal. Hart's appeal was materially defective and did not substantially comply with either the IDAPA or the Idaho Code. The IBTA was under no obligation to permit Hart to amend and perfect an untimely filed appeal. Hart is simply wrong when he writes:

Likewise the IBTA disregarded its own IDAPA rules when it ignored Mr. Hart's right to an additional fourteen (14) day period in which to perfect his appeal of Docket number 21552.

Id., p. 15. The additional 14-day period to perfect an appeal *may* be granted by the IBTA at their discretion, but Hart is not *entitled* to this extra time period. Accordingly, Hart is simply wrong in claiming he has a "right" to this additional fourteen days.

Hart's final argument is that his insufficient deposit only applies to one of the two separate appeals he has filed. *Id.*, p. 15, *et seq.* Hart concedes that Commission rules do not contemplate separate case dockets being combined. *Id.*, p. 16. Hart posits:

With regard to the two cases (Docket numbers 21551 and 21552 respectively), because of the true and correct filing date of the appeals from the decision of the State Tax Commission on both cases any order by the IBTA consolidating them for bond amount determination would be, without basis in rule and also prejudicial to Mr. Hart because he obviously filed the separate 20% cash bond in compliance in case Docket 21551.

...

There is no question given the correct filing date of March 30, 2010 and the payment of the first two checks that the appeal, and 20% bond, for case Docket 21551 was properly filed and the IBTA decision clearly erroneous.

Id., p. 17. Hart also requests an evidentiary hearing with regard to whether his promise to pay amounted to "other security" within the meaning of I.C. § 3049. *Id.*, p. 20. What Hart fails to consider is that his appeal (as to both docket numbers) was untimely and does not comply with IDAPA 36.01.01.0047.01(e). Hart had every opportunity to proffer his combination of insufficient deposit amounts and purported promissory note to the Commission and secure a receipt to provide the IBTA. He did not do so. Ultimately, neither appeal by Hart was timely filed and neither appeal contained proof of compliance with the deposit requirement.

4. Constitutionality of the Bond Requirement.

As mentioned briefly, *supra*, Hart argues the bond requirement at issue in this matter is unconstitutional. Motion for Reconsideration, p. 2. Hart does not elaborate on

his contention and the IBTA does not address it at all. It is possible that Hart recognized the futility of his argument in later briefing and abandoned it, as *Tarbox v. Tax Commission of the State of Idaho*, 107 Idaho 957, 695 P.2d 342 (1984), is directly on point. In *Tarbox*, the taxpayers filed an appeal with the District Court along with a property bond because they were unable to qualify for a surety bond; because the Tarboxes did not file a proper type of bond, the Commission successfully moved for summary judgment. 107 Idaho 957, 959, 695 P.2d 342, 344. On appeal, the Tarboxes argued a surety bond requirement violated their constitutional right to equal protection and due process. *Id.* The Idaho Supreme Court determined the rational basis test was applicable because the Tarboxes do not fall within a special class and the bond requirement does not infringe upon a fundamental right. 107 Idaho 957, 959-60, 695 P.2d 342, 344-45. The Court quoted a 1876 United States Supreme Court case stating:

...the United States Supreme Court upheld the validity of the “pay first, litigate later” rule on the ground that, “it is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted...”

107 Idaho 957, 960, 695 P.2d 342, 345, quoting *Cheatham v. Norvekl*, 92 U.S. (23 Wall.) 85, 89 (1876). The *Tarbox* Court went on to note the appropriateness of a bond being reliable so that the government can collect on it without delay or interference from other creditors if the taxpayer is found liable for a deficiency assessment. *Id.* As discussed *supra*, Hart's purported promissory note was never approved as a proper payment by the Commission and the Board is well within its rights to question the reliability of a promise to pay upon which it would collect if and when Hart were found liable for the deficiency assessment. In *Tarbox*, the Supreme Court recognized the bond requirement jurisdictional prerequisites may be “harsh”, but stated:

...[A]ppellate review is not a constitutional entitlement; rather it is a purely

statutory right, the exercise of which is conditioned upon the manner prescribed by statute. Therefore it is not required by due process.

...

Though the prerequisites to institution of an appeal are demanding, they are reasonable in light of the function served by taxes in our society.

"[T]axes are the life-blood of government, and their prompt and certain availability an imperious need," *Bull v. United States*, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421 (1935).

107 Idaho 957, 961, 695 P.2d 342, 346.

The Supreme Court of Idaho found no constitutional infirmity with I.C. § 63-3049(b)'s bond requirement. Hart's contention to the contrary is simply wrong.

B. IBTA's Motion to Strike.

On January 10, 2011, IBTA filed its "Motion to Strike and Objection to Appellant's Request for Production [actually Request for Admissions, see, Exhibit "A" to Memorandum in Support]", requesting this Court strike the discovery posed by Hart (Request for Admissions) on January 4, 2011, citing "...I.R.C.P. 84(r) and the fact that the hearing on Appellant's Motion to Reconsider scheduled for March 16, 2011, is not an evidentiary hearing." Motion to Strike and Objection to Appellant's Request for Production, p. 1. On January 10, 2011, IBTA also filed a Memorandum in Support of Motion to Strike and Objection to Appellant's Request for Production. On February 15, 2011, Hart filed his "Reply to Respondents' Motion to Motion to Strike and Objection to Appellants Request for Production." Other than correctly noting that it was a Request for Admission (not a Request for Production) which Hart posed to IBTA, Hart's only response to IBTA's motion to strike was to again make Hart's argument that: "If the Court is going to continue to review the 'facial' jurisdictional determination under a 'factual' standard there needs to be facts in the 'new record.'" Reply to Respondents' Motion to Motion to Strike and Objection to Appellants Request for Production, p. 1. The Court has discussed that issue above. IBTA's motion to strike must be granted.

IV. CONCLUSION AND ORDER.


For the reasons set forth above, this Court must deny Hart's motion for reconsideration and grant IBTA's motion to strike.

IT IS HEREBY ORDERED Appellant Hart's Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED Respondent IBTA's Motion to Strike and Objection to Appellant's Request for Production [to Admit] is GRANTED.

IT IS FURTHER ORDERED this Court will sign the Order of Dismissal and Judgment of Dismissal as presented by counsel for IBTA on December 10, 2010.

Entered this 17th day of March, 2011.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 17 day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Starr Kelso

Fax #
208 664-6261 ✓

Lawyer
William A. von Tagen

Fax #
(208) 334-2690 ✓
334-7844 ✓


Jeanne Clausen, Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.

CASE NO. CV 2010-9226

ORDER OF DISMISSAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2011 MAR 17 PM 12:49

CLERK DISTRICT COURT
DEPUTY

This Court having considered and heard argument on the 7th day of December 2010 regarding Respondent's Motion to Dismiss, and this Court having further reviewed the pleadings and the record, including the record of the Board of Tax Appeals in this case, and the Court having further reviewed and considered the briefs of the parties, and the Court finding good cause for Defendant's Motion to Dismiss;

NOW, THEREFORE, IT IS HEREBY ORDERED, AND THIS DOES ORDER that the above-referenced case be DISMISSED pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure, with prejudice, in accordance with this Court's order to grant Respondent's Motion to Dismiss.

DATED this 17th day of March 2010.


JOHN T. MITCHELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, the undersigned authority, do certify that I have mailed, by United States Mail, on this 17 day of March 2010, one copy of the ORDER OF DISMISSAL pursuant to the Idaho Rules of Civil Procedure to each of the parties, or their attorneys of record, in this cause in envelopes addressed as follows:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815 ✓

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312 ✓

WILLIAM A von TAGEN
DEPUTY ATTORNEY GENERAL
IDAHO STATE TAX COMMISSION
PO BOX 36
BOISE ID 83722 ✓



JEANNE CLAUSEN
DEPUTY CLERK

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2011 MAR 17 PM 12:49

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CLERK DISTRICT COURT
[Signature]
DEPUTY

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.

CASE NO. CV 2010-9226

JUDGMENT OF DISMISSAL

FINAL JUDGMENT is entered herein pursuant to I.R.C.P. 54(a) in favor of Respondents dismissing the Appeal From The Idaho Board of Tax Appeals Pursuant to I.C. 63-3812 and Rule 84 Idaho Rules of Civil Procedure.

DATED this 17th day of March 2010.

BY THE COURT

[Signature]
HON. JOHN T. MITCHELL
District Judge

CERTIFICATE OF MAILING

I, the undersigned authority, do certify that I have mailed, by United States Mail, on this 17 day of March 2010, one copy of the JUDGMENT OF DISMISSAL pursuant to the Idaho Rules of Civil Procedure to each of the parties, or their attorneys of record, in this cause in envelopes addressed as follows:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815 ✓

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312 ✓

WILLIAM A von TAGEN
DEPUTY ATTORNEY GENERAL
IDAHO STATE TAX COMMISSION
PO BOX 36
BOISE ID 83722 ✓



JEANNE CLAUSEN
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.

CASE NO. CV 2010-9226

ORDER OF DISMISSAL

STATE OF IDAHO
COUNTY OF KOOTENAI

2011 MAR 17 PM 12:49

CLERK DISTRICT COURT

DEPUTY

This Court having considered and heard argument on the 7th day of December 2010 regarding Respondent's Motion to Dismiss, and this Court having further reviewed the pleadings and the record, including the record of the Board of Tax Appeals in this case, and the Court having further reviewed and considered the briefs of the parties, and the Court finding good cause for Defendant's Motion to Dismiss;

NOW, THEREFORE, IT IS HEREBY ORDERED, AND THIS DOES ORDER that the above-referenced case be DISMISSED pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure, with prejudice, in accordance with this Court's order to grant Respondent's Motion to Dismiss.

DATED this 17th day of March 2011

April 5, 2011, none pro time to March 17, 2011, with

JOHN T. MITCHELL
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, the undersigned authority, do certify that I have mailed, by United States Mail, on this 17 day of March ²⁰¹¹~~2010~~, one copy of the ORDER OF DISMISSAL pursuant to the Idaho Rules of Civil Procedure to each of the parties, or their attorneys of record, in this cause in envelopes addressed as follows:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815 ✓ *Mid*

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312 ✓ *664-6261*

WILLIAM A von TAGEN
DEPUTY ATTORNEY GENERAL
IDAHO STATE TAX COMMISSION
PO BOX 36
BOISE ID 83722 ✓ *208-341-1844*



JEANNE CLAUSEN
DEPUTY CLERK

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2011 MAR 17 PM 12:49

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CLERK DISTRICT COURT
DEPUTY

PHILIP L. HART,

Petitioner,

vs.

IDAHO STATE TAX COMMISSION and
IDAHO BOARD OF TAX APPEALS,

Respondents.

CASE NO. CV 2010-9226

JUDGMENT OF DISMISSAL

FINAL JUDGMENT is entered herein pursuant to I.R.C.P. 54(a) in favor of Respondents dismissing the Appeal From The Idaho Board of Tax Appeals Pursuant to I.C. 63-3812 and Rule 84 Idaho Rules of Civil Procedure.

DATED this 17th day of March ~~2010~~ ²⁰¹¹

April 5/2011, Nunc pro tunc to March 17, 2011.

BY THE COURT

[Signature]
HON. JOHN T. MITCHELL
District Judge

CERTIFICATE OF MAILING

I, the undersigned authority, do certify that I have mailed, by United States Mail, on this 17 day of March ~~2010~~²⁰¹¹, one copy of the JUDGMENT OF DISMISSAL pursuant to the Idaho Rules of Civil Procedure to each of the parties, or their attorneys of record, in this cause in envelopes addressed as follows:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815 *Mid*

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816-1312 *✓ 664-6261*

WILLIAM A von TAGEN
DEPUTY ATTORNEY GENERAL
IDAHO STATE TAX COMMISSION
PO BOX 36
BOISE ID 83722 *✓ 208-334-7844*


JEANNE CLAUSEN
Deputy Clerk

STARR KELSO
ATTORNEY AT LAW #2445
P.O. BOX 1312
COEUR D'ALENE, IDAHO 83816
TEL: 208-765-3260
FAX: 208-664-6260

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: # 7457

2011 APR 22 PM 1:56

CLERK DISTRICT COURT

DEPUTY

Attorney for Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

PHILIP L. HART, : CASE NO. CV- 10-9226
Appellant, :
 : NOTICE OF APPEAL
vs. :
 :
IDAHO STATE TAX COMMISSION :
and IDAHO BOARD OF TAX APPEALS, :
Respondents. :

TO: THE ABOVE NAMED RESPONDENTS IDAHO STATE TAX COMMISSION AND
THE IDAHO BOARD OF TAX APPEALS AND THE PARTIES ATTORNEY WILLIAM A.
VON TAGEN, STATE OF IDAHO DEPUTY ATTORNEY GENERAL, AND THE CLERK
OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant appeals from the Memorandum Decision and Order Granting Respondents' Motion to Dismiss entered on December 8, 2010 by Honorable Judge John T. Mitchell presiding, the Order Regarding March 16, 2011, Hearing entered on March 11, 2011 by Honorable Judge John T. Mitchell presiding, the Order Denying Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011, the Order Denying Appellant Hart's Motion for Reconsideration, and Order Granting IBTA'S Motion to Strike entered on March 17, 2011 by Honorable Judge John T. Mitchell presiding, the Order of Dismissal entered on April 5, 2011, nunc pro tunc to March 17, 2011 by Honorable Judge John T. Mitchell presiding, and the Judgment of Dismissal

1 NOTICE OF APPEAL

entered on April 5, 2011, nunc pro tunc to March 17, 2011 by Honorable Judge John T. Mitchell presiding.

2. That the Appellant has the right to appeal to the Idaho Supreme Court, and the judgment described in paragraph 1 above is an appealable order under and pursuant to Rule 11 (a) (1) Idaho Appellate Rules.
3. Preliminary statement of the issues on appeal:
 - A. Whether the district court erred determining it did not have “facial” subject matter jurisdiction under I.R.C.P. 12 (b) (1) on Appellant’s appeal that was timely filed under I. C. § 63-3812 and Rule 84 of the I.R.C.P.
 - B. Whether the district court erred in determining it did not have “facial” subject matter jurisdiction after Appellant sought reconsideration, of its order determining it did not have “facial subject matter jurisdiction, when his motion was supported by his un rebutted and unobjected to affidavit?
 - C. Whether the district court erred in denying Appellant’s motion, supported by affidavits, to reschedule the hearing on his motion for reconsideration?
4. An order has not been issued sealing all or a part of the record.
5. (a) A reporter’s transcript is requested.
 - (b) The Appellants request the preparation of the reporter’s transcript in hard copy of all oral argument before the Court including but not limited to the oral argument held on:
 - (1) December 7, 2010 (Julie Foland, court reporter)
 - (2) March 16, 2011 (Julie Foland, court reporter)
6. The Appellants request pursuant to Idaho Appellate Rules, Rule 27 (b) that the clerk of the district court scan the entire district court file as the record in lieu of the appellant designating certain documents to be included in the record.
6. I certify:
 - a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested:

Julie Foland, Court Reporter, P.O. Box 9000, Coeur d’Alene, Idaho 83816-9000.
 - b. The clerk of the district court has been paid the estimated fee for preparation of the reporter’s transcript.

2 NOTICE OF APPEAL

- c. That the estimated fee for preparation of the Clerk's record has been paid.
- d. That the appellate filing fee has been paid.
- e. That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 22 day of April, 2011.

Starr Kelso
Starr Kelso, Attorney for Appellant

CERTIFICATE OF SERVICE: I certify that a true and correct copy of the foregoing was mailed by U.S. Mail, postage prepaid thereon, to: and

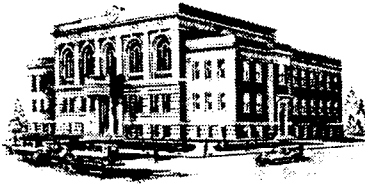
William A. von Tegen
Deputy Attorney General
P.O. Box 36
Boise, Idaho 83722

and

Julie Foland
Court Reporter
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000

Starr Kelso 4-22-11
Starr Kelso

3 NOTICE OF APPEAL



Julie K. Foland
Official Court Reporter ID CSR No. 639
324 West Garden Avenue Kootenai County
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1130
Email: jfoland@kcgov.us

2011 MAY 10 PM 12:32

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720

CLERK DISTRICT COURT

DEPUTY

Sherry Huffman

DOCKET NO. 38756-2011

(
(PHILIP L. HART CV10-9226
(
(vs.
(
(TAX COMMISSION

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on May 10, 2011, I lodged a transcript of 42 pages in length, including the December 7, 2010, Hearing Re: Motion to Dismiss, and the March 16, 2011, Hearing Re: Motions to Reconsider, Motion to Strike, for the above-referenced appeal with the District Court Clerk of the County of Kootenai in the First Judicial District.

Julie K. Foland
Signature

JULIE K. FOLAND

May 10, 2011

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

IN THE SUPREME COURT OF THE STATE OF IDAHO

2011 JUN 29 AM 8:27

CLERK DISTRICT COURT

DEPUTY

Philip L. Hart

Appellant,

vs

Idaho State Tax Commission and
Idaho Board of Tax Appeals

Respondents.

SUPREME COURT NO.
98756-2011

KOOTENAI COUNTY
CASE NO. CV10-9226

CLERK'S CERTIFICATE OF SERVICE

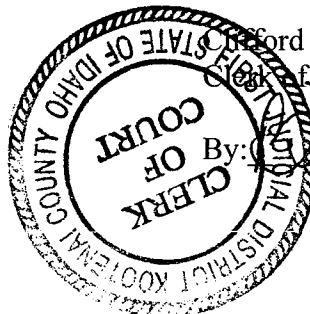
William A. von Tagen
Deputy Attorney General
PO Box 36
Boise, ID 83722

I hereby certify that I have mailed a true and correct copy of the Clerk's Record on
Appeal to the above listed party.

DATED this 29 day of June, 2011.

#779

☒ Faxed to Supreme Court (208) 334-2316



Clifford T. Hayes
Clerk of District Court

By:

[Signature]

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

IN THE SUPREME COURT OF THE STATE OF IDAHO

2011 JUN 29 AM 9:28

Philip L. Hart

Appellant,

vs

Idaho State Tax Commission and
Idaho Board of Tax Appeals

Respondents.

CLERK DISTRICT COURT

DEPUTY

SUPREME COURT NO.
38756-2011

KOOTENAI COUNTY
CASE NO. 2010-9226

CLERK'S CERTIFICATE OF SERVICE

Starr Kelso
P.O. Box 1312
Coeur d'Alene, ID 83816

Starr Kelso

Date

[] Faxed to Supreme Court (208) 334-2616

Clifford T. Hayes
Clerk of District Court

By: Cathy Victorino